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NO._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HUBERT PAYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER AN ACCUSED'S RIGHT OF CONFRONTATION AND THE HEARSAY RULE WERE VIOLATED WHEN INCRIMINATING EVIDENCE IN THE FORM OF STATEMENTS AND COMMENTS ATTRIBUTED TO THE ACCUSED BY A NON-TESTIFYING DECLARANT ARE SUBSTANTIVELY ADMITTED AS PROOF OF GUILT.

II

WHETHER DUE PROCESS WAS DENIED THE ACCUSED WHEN THE JURY WAS ALLOWED TO CONSIDER AN EXTENSIVE QUANTITY OF EVIDENCE, THE ADMISSION OF WHICH CANNOT BE SQUARED WITH THE REQUIREMENTS OF RULE 801(d)(2)(E).

III

EVEN ASSUMING CERTAIN INCONCLUSIVE DISCUSSIONS PARTICIPATED IN BY AN ACCUSED CAN BE SAID TO TRANSLATE INTO AN "AGREEMENT," DOES PROOF THAT A WITHDRAWAL OCCURRED BEFORE THE FIRST OVERT ACT CHARGED IN THE INDICTMENT WAS CONSUMMATED PROVIDE A COMPLETE DEFENSE TO TITLE

18 CONSPIRACY CHARGE.

IV

WHERE THE FACTS, AT LEAST ARGUABLY, SHOW THAT (AT MOST) THE "AGREEMENT" ELEMENT OF A TITLE 18 CONSPIRACY WAS REACHED ON A PARTICULAR DATE (HERE, MARCH 31, 1989) AND THE PROOF SHOWS ONE OF THE PARTIES TO SUCH "AGREEMENT" WITHDREW BEFORE THE NEXT "OVERT ACT" CHARGED IN THE INDICTMENT WAS ALLEGED TO HAVE OCCURRED (HERE APRIL 4, 1989), COULD THE EVIDENCE STILL BE SUFFICIENT TO SUPPORT A CONVICTION OF THE PERSON WHO WITHDREW.

V

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VI

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VIII

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable, The Chief Justice And
Associate Justices Of The
Supreme Court Of The United States:

The Petitioner, Hubert Payne, respectfully prays that a Writ

of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals, which judgment became final June 22, 1992 (Appendix "A") when a Petition for Rehearing *En Banc* (Appendix "B") was denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth at Appendix "C" in the Appendix to this Petition. The Opinion is formally reported as **United States v. Hubert Payne, 962 F.2d 1228 (6th Cir. 1992).**

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the U.S. Court of Appeals was entered on May 5, 1992. The Order denying a Petition for Rehearing was entered on June 22, 1992. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254 (1).

Jurisdiction is also being invoked under favor of ***Rule 10.1(a), Rules of the Supreme Court***.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES:

1. Fifth Amendment, United States Constitution
2. Sixth Amendment, United States Constitution
3. 18 U.S.C. §371
4. 18 U.S.C. §1952
5. Rule 29, Federal Rules of Criminal Procedure
6. Rule 30, Federal Rules of Criminal Procedure
7. Rule 401 Federal Rules of Evidence
8. Rule 801(d)(2)(E) Federal Rules of Evidence

STATEMENT OF THE CASE

Hubert Payne, the petitioner herein, was charged in two counts of a multiple defendant, multiple count indictment. Of those indicted only Val King, Leonard Trem and the petitioner went to trial. Frank Coyle, Ralph Jones and Farris Williams all pled guilty to Count One, the Conspiracy charge.

At the trial of this cause Hubert Payne was acquitted on

Count Three, which substantively charged that on April 12, 1989, he and Val King laundered $25,000.00 in violation of 18 U.S.C., §1956(a)(3) and §2. He was convicted of the Title 18 Conspiracy charged in Count One. Val King, who likewise was convicted on Count One, the Conspiracy Charge, was also convicted of the substantive offense charged in Count Three. Leonard Trem was acquitted of the charges made against him.

The chief witness against our petitioner was one Frank J. Monaghan, a special agent of the IRS. His evidence was that his duties entailed being "in charge of narcotics, money laundering and undercover investigations" (Vol. I, pp. 72-73). This agent was allowed to testify that he had various recorded conversations with Frank Coyle, one of the co-defendants on the indictment who had pled guilty to the conspiracy charge made in the indictment. The first of the recorded conversations had by Monaghan with Coyle occurred on July 12, 1988 (id., 80). In opposing the playing of this tape, the argument was made that "the Government

[could]n't possibly be contending there was a conspiracy in existence on this date and that the conversation is in furtherance thereof" (id., 81). In responding that the Government indeed was so contending, interestingly this was said to be so because, as counsel opposite saw it, it was significant that Frank Coyle actually indicated during this conversation that "he had talked with Val King [mentioned him] in the past and that Val King had [reportedly said he had] associates who could launder money." (Id., 82.) And, that because this conversation occurred after what counsel opposite regarded as "the formation of a conspiracy between Frank Coyle and Val King" (ibid), this rendered the evidence admissible.

What distills from this particular taped conversation is that a plan was discussed whereby Monaghan could deliver cash to Frank Coyle who would give it "to Val King who, in turn, would turn it over to an attorney" (id., 94). The money would then be laundered by this attorney (ibid).

Our 801(d)(2)(E) objections to the playing of the taped conversations was made subject to a continuing objection by the Court (id., 104). The upshot of the facts emerging from this evidence is that it clearly shows the involvement of Coyle, Jones and Williams in a conspiracy to launder money.

Next, Monaghan testified he had an unrecorded conversation with Coyle on March 20, 1989. As to this, the jury was permitted to hear the following testimony:

> **Q.** Would you please tell the Jury the content of that conversation?
>
> **MR. WILLIS:** Objection.
>
> **THE COURT:** Overruled.
>
> **A.** Frank Coyle said ... that Val King and another individual who was a [pillar] of the community would take my money and handle it for me instead of the attorneys [i.e., Jones and Williams].
>
> * * *
>
> **Q.** Turning your attention now to March 23rd, do you recall coming back to

Cleveland, Ohio?

A. Yes. I met with Frank Coyle and Val King.

* * *

Q. ... can you briefly tell the Jury the topics that were discussed between yourself, Frank Coyle and Val King on that date?

A. ... [King] told me that he and his associate could handle my currency. However, they were going to charge me a 20-percent fee.

* * *

Q. And who did he identify as being his associate?

A. Hubert Payne.

Id., 137. (Emphasis supplied.)

Further, the Court even allowed this witness to tell the jury an agreement was reached between himself "and Val King on March 23, 1989."(Id., 144.) And, that the parties to the agreement were "Val King, Hubert Payne and Frank Coyle" (id.

145). Simply put, Monaghan was able to provide expert testimony that the agreement element required (for a Title 18 conspiracy) was fully satisfied, even as to Payne (who was not present), during this March 23, 1989 meeting.

The next testimony of significance, developed by the Government, centralized the meeting had at the Airport Sheraton Hotel at which Payne, King, Coyle and Monaghan were present. This meeting occurred on March 31, 1989. The recorded conversants were Hubert Payne (for the first and only time), Val King, Coyle and, of course, Monaghan (id., 149-150).

On cross-examination, Monaghan testified that inasmuch as his dealings with attorneys Jones and Williams had been a total "failure or disaster" (id., 298), the point had been reached where he "had no intention of letting them have more money" (id., 298).

The conversation Monaghan had (with Coyle and Val King) on the 23rd of March is also significant for other reasons as well. It is significant because Val King specifically informed Monaghan

(i.e., on March 23, 1989) that he would have to discuss Monaghan's proposition with someone else -- arguably, Hubert Payne (ibid). Thus, Monaghan's response to counsel's question makes it clear that he understood King and this other person would have to discuss his proposition before making any decision (id., 306-307). Simply stated, it was clear that Monaghan understood King and this other person would have to discuss his proposition before making any decision (id., 306-307).

This insuperable fact becomes most critical, if not dispositive, when considered in the light of Monaghan's further testimony that "quite often", in his experience, people in this business "throw other people's names [around] ... in order to lend the weight of their reputation to the venture" (id., 315). Simply put then, even though Monaghan voiced the opinion that King had entered into an agreement with him whereby "they [King and Payne] were going to handle ... [his] money" if and when he came to town (id., 317), Monaghan simply could not get away from the

plain meaning of some of his own words. These unambiguous comments showed that no agreement ever really crystallized.

The Record on this point is most clear. Indeed, Monaghan specifically admitted that when he stated "once we get all this going and organized [he] was talking about the future" (id., 319). As actually put by Monaghan, he was "talking about this $25,000 that ... [he] was going to give him (i.e., Val King) as well as some more money..." (id., 319). (Emphasis supplied.)

Having made this flat-out concession, the following testimony rendered by Agent Monaghan really makes our point. Here he testified:

> **Q.** So what was supposed to happen after that based on what you had been told earlier by King, that he and Payne would have to have a discussion to work out certain percentages and points, and this thing was to get organized in the future.
>
> You just got through saying that, didn't you?

A. During a couple hour discussion undercover, it is pretty hard to watch what you say, but, yes, I did say that.

* * *

Q. You were in charge of this meeting because you were the one who was filtering through the critical questions, correct?

A. I was asking the critical questions, correct.

* * *

Q. And you sort of had a script, you know, with the lead lines, and you were simply filling in these blanks in this role. You did a lot of ad libbing?

A. No. What happens is they tell you -- the agents in charge of the case tell you what they want accomplished and give you that broad, you know, outline, and that's it.

Q. Yes. You can do that with any actor. If he knows that pl[o]t, he can ad lib what goes in the middle, can't he?

A. Yes.

Id., 319-320 (Emphasis supplied.)

Frank Coyle, testifying as a Government witness, revealed that he had known Hubert Payne for twenty years and Val King for fifteen (id. 349). Coyle admitted to his knowing participation with Jones and Williams in a Money Laundering scheme with Monaghan.

Significant here, despite our objection to the admission against Payne of the considerable testimony showing the Jones-Williams' venture, the Government was able to emphasize (through Frank Coyle) the earlier testimony rendered by Agent Monaghan showing his own role in their illegal activities (id., 367 et. seq.). Here Coyle testified he discussed the need he had to "find somebody" (id., 377) with Val King and that King supposedly responded by telling him "he had somebody that said [they] could do it" (id., 378). The Court also allowed Coyle to testify, again over objections, that Val King then gave him Hubert

Payne's name (id., 379).

The next event of importance, testified to by Coyle, related to the March 23, 1989 meeting at the Bond Court Hotel in which those present were Coyle, King and Agent Monaghan (id., 380). According to Coyle, the sole purpose of this meeting was simply "to introduce Val [King] to ... [Monaghan] and to say he had a way of getting the money laundered a lot quicker and a lot cleaner" (id., 381). (Emphasis supplied.) Despite this stated purpose Coyle was permitted to give the jury his interpretation of a reference made on the taped version of this particular conversation. Id., 384-385.

Also, Coyle testified that when Val King mentioned Hubert Payne's name as a possibility, he questioned King about that and was told by King -- "Hubert's my friend. He will do anything for me" (id., 511). And, as to the meeting on March 31, 1989, Coyle testified he would analogize Payne's reference to "people ... who were involved in Money Laundering," to a businessman's

"puffing" (id., 513-514). In fact, Coyle's direct response was "that is [indeed] what it is called" (id., 514). This critical thought Coyle further punctuated by testifying that even he did not, and obviously could not, "know whether or not Mr. Payne was puffing ..." (id., 515).

Granted Coyle testified that on April 12, 1989, Payne delivered him the crucial $25,000 check (Exhibits 45T and 39), that was washed by Coyle through the Putnam account (id., 407). However, Frank Coyle readily admitted to the incontrovertible fact that we only have his "word" this is what happened (id., 524), which is what he obviously had to say. Because this is so, it is being emphasized that in his original statements to the agents, following his plea bargain and conversion into an essential witness for the Government, Coyle concedes that he told the Government Hubert Payne was driving his Jaguar (which Payne did not own or have on this critical date), when Payne assertedly gave him the $25,000.00 check "in front of [Coyle's] building" (id., 517-518).

Despite this testimony, the Government rather cleverly made an all out effort to get Coyle to retreat from the identification of the car as a Jaguar. Still it seems clear enough (from various segments of the Record) that Coyle was intentionally manipulated by Agent Rasoletti. (Tr., 518-522 & 734.)

Still another point was well made, for us, when Frank Coyle conceded that when he first told the agent Payne gave him the check he was indeed trying to curry the favor of the Government in hopes his own problems "would go away" (id., 523.) Coyle also admitted it came to him as "a major surprise" that Monaghan, after having expressed extreme dissatisfaction with Jones and Williams, continued to deal with them "behind ... [his] back" (id., 524).

The upshot of this latter point is that it truly exposes the wrong done Hubert Payne by the admission of evidence of Monaghan's dealing with Jones and Williams both before March 31, 1989 and after that date.

II

In addition to an array of character witnesses, Hubert Payne testified. Payne's evidence was designed to show that he did indeed accompany Val King to the meeting at the Airport Sheraton Hotel (Id., 828). His explanation for going to this meeting was simply stated: "[Val King] told me he had met[1] a contact of Frank Coyle and [Val] wanted me to meet him; that he wanted me to evaluate a situation regarding that contact."

Payne indicated his purpose in mentioning such things as investment gems and the like was "to facilitate the conversation, to move the conversation along, to see, try to find out what it was that Monaghan wanted" (id., 830). And, that he was really "storytelling" (id., 832). On this point, Payne then testified that when he left the Hotel with King that: "I told ... [King] that I didn't like the deal and that I didn't want any part of it and that I

---

[1] *Clearly this was a reference to the meeting Val King had with Agent Monaghan and Coyle on March 23, 1989 at the Bond Court Hotel.*

would talk to him a bit more in-depth the next day." Continuing, Payne testified:

* * *

Q. Now, prior to going to the hotel, had you heard the word "cocaine" or "drugs"?

A. No.

Q. And when was it that you first learned that cocaine or drugs was in some way involved in whatever the business venture was supposed to be?

A. When Mr. Monaghan mentioned it.

Q. At that point, what did you do?

A. I continued with the conversation, and I made a number of statements relative to that conversation.

Q. It was after you left the hotel that you and Mr. King were alone in the car, that's when you expressed your dissatisfaction; am I correct?

A. Yes, sir.

(Tr., Vol. III, pp. 834-837.) (Emphasis supplied.)

Payne's cross-examination showed him seriously diffusing the idea that as a businessman he would have thoroughly versed himself as to the purpose of the meeting at the Sheraton Hotel rather than "just fly by the seat of [his] ... pants" (id., 857) as he says he did here. This, of course, lends serious substance to Payne's unchallenged denial that he had any prior knowledge from Val King that Monaghan "was a [reputed] drug dealer" (id., 858).

To this end, Payne emphasized that once it became clear to him Monaghan was claiming to be a drug dealer, he (Payne) simply "played the scenario out" (id., 862). And, that in doing so he "was making it up as he went along" (id., 863).

These points are well made when one considers the fact that even Monaghan made reference to doing basically the same thing -- that is, acting out a scenario. The following segment of Payne's redirect examination makes this precise point:

> **Q.** Mr. Payne, several times in responding to questions put by Mr. Bakeman you indicated that you were acting out the scenario that had been

established?

A. Yes.

Q. Now, it is true, isn't it, that a number of times Mr. Monaghan made reference to the fact that "We are bullshitting" or, "We are just talking"?

A. Yes, he did.

Q. What did you understand him to mean when he said, "Well, we are just talking or bullshitting"? What did you understand him to mean?

A. That there was no commitment or anything firm; that we were talking about possibilities of things that could be done.

Q. And when you left that meeting, it was your understanding, wasn't it, that you would get back in touch with Mr. Monaghan or Mr. Coyle?

* * *

A. It was my impression that Mr. Monaghan or perhaps Mr. Coyle might contact either Val or me.

Q. And was it before Monaghan or

Coyle contacted you or Val that you told Val you didn't want anything to do with this proposition?

A. I told him that when we left the meeting, and I reinforced that the next day.

(Tr., Vol. III, pp. 900-901.)

III

At the close of all the evidence, the petitioner again moved for the exclusion of "all the conversation and the like involving Messrs. Jones and Williams" (Vol. III, 917). Additionally, counsel argued that even if it can be said there was an agreement made on the 31st of March, it was still our position that a mere agreement would not be enough. Further, it was specifically maintained that "what it requires is for a conspiracy to come into being is an agreement plus an overt act" (id., 921).

Here counsel argued a predicate for the admission of testimony as to events and occurrences that took place prior to March 31, 1989 must be present. This was said to be so because

of "the transactions that initially existed between Frank Coyle and [Agent] Monaghan as it developed [through] Jones and Williams and then developed through Val King and then Hubert Payne, the agreement has always been consistent" (id., 925). Having said that, counsel then contended that Payne's involvement was merely "a continuation of the same agreement, that is, to launder the money for Frank Monaghan" (id., 926).

Simply put, the Government's theory at that time was there was just "one conspiracy" (id., 926), that Payne was a member of that conspiracy and the assailed statements were "in furtherance of and in the course of the conspiracy ... [that had its inception] on July 12, 1988 and completed ... on or about April 21st, 1989 ... [hence] clearly all the statements were made during the course of the conspiracy" (id., 927).

First, as to the 801(d)(2)(E) objection, it was summarily overruled by the Court. Having done that, the Court then issued a query as to whether the Government had offered evidence of two

(2) conspiracies and if so what would be its effect. Responding to this, in support of his Motion for Judgment of Acquittal, counsel then argued:

> **[MR. WILLIS]** ... I am contending that the evidence is insufficient to support a finding that he was a party to the first branch of what I regard as the multiple conspiracies alleged in the indictment or, at least, as demonstrated by the evidence, because there is absolutely nothing that ties him into Jones and Williams.
>
> ... [L]et's assume that an agreement was reached. Certainly, a conspiracy requires more than an agreement.
>
> It requires an act in furtherance, an overt act in furtherance of that and ... it has to be one alleged in the indictment.
>
> The one that is alleged in the indictment is April 4th. Inasmuch as the defendant has offered some evidence that he withdrew, the Government has the burden of proving that he did, in fact, not withdraw. The Government has

> offered no such evidence.
>
> So for that reason, your Honor, I feel that the defendant is entitled to a judgment of acquittal, and we ask that the Court make that ruling.

(Tr., Vol. III, pp. 945-946 & 955-956.) (Emphasis supplied.)

Of critical importance here, in what is clearly a totally different position to that originally taken in his successful effort to overcome our 801(d)(2)(E) objections (Tr., 927-928), counsel opposite argued to the jury that:

> **[MR. BAKEMAN]** Now, what in this particular case is the evidence of the agreement? Again, I am drawing your attention to the time period following a telephone call received by Frank Coyle ... where Val King suggested to Frank Coyle that he had some other persons, particularly Hubert Payne, who were interested in laundering money.
>
> ... [O]n March 23rd, 1989 that Frank Monaghan in an undercover capacity met with Frank Coyle and Val King at the Bond Court.
>
> Was there an agreement reached at this meeting? I suggest to you, ladies and gentlemen, that absolutely the evidence showed that an agreement was reached to launder the drug dealer's money.

Specifically you heard on the tape, ladies and gentlemen, where King told the person who he believed to be a drug dealer ... that Payne [who was not at this meeting] can launder the money for a 20 percent fee.... And that's essentially the agreement.

Now, who were the members? Who had joined in on this agreement as of March 23rd, 1989?

Again, I suggest that the evidence shows beyond a reasonable doubt that who had entered into that agreement is Hubert Payne, Val King and Frank Coyle; that all three names were mentioned in that conversation; that Val King specifically said he talked to Hubert Payne. He specifically said what Hubert Payne had agreed to do.

So as of March 23rd, 1989, there was an agreement and there were three participants, Coyle, King and Payne.[2]

Now, ladies and gentlemen, what acts were committed, if any, in furtherance of this agreement? The first overt act was that a decision was made to meet with Hubert Payne ... In that meeting Hubert Payne outlined exactly how the money laundering

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[2] *A point of critical significance as to this contention, which was adopted by the Court of Appeals is that Monaghan indicated the only agreement reached at this March 23 meeting with King was that they would have a future meeting with Payne present (Vol. I, p. 144).*

was to take place....

> What else did Hubert Payne do in furtherance of this conspiracy? On ... March 31st, 1989, at the Sheraton Hopkins? He gave his business card to this person who posed as a drug dealer. That is an act in furtherance of the conspiracy.

(**Closing Arguments**, at Tr., Vol. II, pp. 1046-1048.)

IV

Next, the Record here shows the Court rejected our specific request (Rule 30, Federal Rules of Criminal Procedure) that the Court instruct the jury that where "there is some evidence on the issue of withdrawal, then the Government has to disprove withdrawal beyond a reasonable doubt ..." (Vol, III, p. 1005). (Also see id., p. 1162.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

What seems clearly to be the case here is that it can hardly be contended that Val King could make Hubert Payne a member of a conspiracy simply by saying to, either, Coyle and/or Monaghan (the Federal Agent) that Hubert Payne could be

interested (or was interested) in their money laundering ventures. This follows because of the absence of proof showing Hubert Payne had indeed entered into a conspiratorial relationship with King (or Coyle) and that Val King's statement (that he was interested) was made in furtherance of that relationship.

In this case, the point was made that even if we fully concede that the government proved that on March 31, 1989 Hubert Payne actually engaged in a conversation, which could have ended up in some sort of an agreement, this conversation itself could not possibly make for the charged conspiracy. However, these preliminary discussions are more aptly viewed, or regarded, as naked assertions which fail to impose criminal liability on Hubert Payne. This follows because clearly one cannot be found to have conspired with another, simply because the statements made by some other person suggests such may have been the case. This conclusion is a necessary consequence of the fact that one can only be convicted on the basis of their own acts

or declarations and not on the basis of the statements of others.

Here, too, we are submitting the contention that any reasonable juror would have to conclude that Coyle was not credible. This fact even counsel opposite apparently believed since he shifted from relying on Coyle's evidence as being a force in the government's proof. This conclusion surfaces from a study of counsel opposite's summations to the jury.

With reference to various factual findings made by the Court of Appeals, this Court hopefully will credit the ten (10) major flaws in the Court's recitation of the "facts" that were isolated. These flaws are specifically set forth in the Petition for Rehearing, Appendix "B", to this Petition, at pages A-7 - A-10. Given counsel-opposite's obligation to insure that any Opinion worthy of being reviewed should not contain easily corrected mis-statements, it is hoped counsel will agree with our characterization of these particular findings as being flawed and indefensible.

I. AN ACCUSED'S RIGHT OF CONFRONTATION AND THE

HEARSAY RULE ARE VIOLATED WHEN INCRIMINATING EVIDENCE IN THE FORM OF STATEMENTS AND COMMENTS ATTRIBUTED TO THE ACCUSED BY A NON-TESTIFYING DECLARANT ARE SUBSTANTIVELY ADMITTED AS PROOF OF GUILT.

What seems clearly to be the case here is that arguably it can be said that Frank Coyle and Val King were co-conspirators, or that they were (after Jones and Williams were eliminated by Monaghan) engaged in a conspiracy to attempt to locate someone to "launder" what was believed by them to be Monaghan's drug money. Still, it can hardly be contended that Val King could make Hubert Payne a member thereof simply by saying, to either, Frank Coyle and/or Monaghan (the federal agent) that Hubert Payne could be interested (or was interested) in working with them. This follows because of the absence of proof showing Val King and Hubert Payne had indeed entered into a conspiratorial relationship and that Val King's statement was made in furtherance of that relationship.

Our point in this regard flows from the following insuperable analysis. Under Rule 801(d)(2)(E), the requirements that must be met for statements of the type here being assailed to be admitted include the requirement that both the declarant (here, Val King) and the defendant (here, Hubert Payne) must be members of the conspiracy. The law still regards the membership requirement, as well as other factors, as elements that must be established by the preponderance of the evidence. **Bourjaily v. United States, 488 U.S. 171, 175 (1987).**

In our judgment the Government failed to show that a conspiracy existed that included Val King and Hubert Payne when the conversations between Val King, Coyle and Monaghan took place and Hubert Payne's name was inserted into these conversations by Val King. The conversations being referred to took place on March 23, 1989 and before. (This same analysis applies as well to all testimony related to the Jones-Williams aspects of the charged conspiracy.)

In a nutshell, what we are talking about here is the fact that statements and comments incriminating Hubert Payne (that were attributed to Val King, who did not testify -- and consequently could not be cross-examined) were admitted against Hubert Payne as proof of the matter asserted. The same is true with reference to statements made by Val King on March 23, 1989. In our judgment, statements of this type invariably, as was the case with the various statements here being assailed, prejudice any non-declarant co-defendant. In this case, Hubert Payne fits this description. Thus it should suffice to note that even if limiting instructions had been given (which, of course, did not happen) the resulting prejudice could not possibly have been eliminated. See **Bruton v. United States, 391 U.S. 123, 126 (1968)** and **United States v. Basey, 816 F.2d 980, 1004 (5th Cir. 1987).**

Now we do concede that the government proved that Hubert Payne on March 31, 1989, readily engaged in conversations which arguably can be interpreted as being a prelude

to some sort of criminal venture. The earlier conversations in which Val King and Frank Coyle inserted Payne's name into conversations they were having with Agent Monaghan are more aptly viewed, or regarded as naked assertions which could only incriminate the spokesman. This follows because clearly one cannot be found to have conspired with another, simply because the statements made by this other person suggests such may well have been the case. This conclusion is a necessary consequence of the fact that one can only be convicted on the basis of their own acts or declarations and not on the basis of the statements of others.

With reference to the various hearsay statements here being assailed, it is undeniable they were admitted as proof of the matters asserted (Rule 801[C]). On the other hand, the most that can be said for these various statements is that they are more easily viewed as simply being narrative declarations which are inadmissible.

Another point to be made here recognizes that if it is the law that any statement made by one shown to be a conspirator is automatically admissible, then the central requirement of Rule 801(d)(2)(E) -- that the statement must also be in furtherance of the conspiracy -- would lack any legal significance. And, to be admissible, all the prosecution would be required to show is that a particular statement was made by a co-conspirator and it could automatically be considered against all persons claimed by the government to be members. Indeed, this appears to have been what occurred here. For our trial Court simply credited the fact of her determination that a conspiracy existed as providing a sufficient basis for the retroactive validation of the admission of everything that was said on the tapes and otherwise by Coyle and King to Monaghan about Payne.

Under the theory of exclusion here being contended for, Val King's own admission of culpability and Val King's assertions as to the willingness of Hubert Payne to engage in criminal

conduct can only be regarded as inadmissible. See **United States v. Doerr, 886 F.2d 944, 951-952 (7th Cir. 1989)** and **Garlington v. O'Leary, 879 F.2d 277, 283-284 (7th Cir. 1989)**. Also see, **United States v. Paone, 782 F.2d 386 (2d Cir. 1986)** and **United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979)**.

Of significance here, we are indeed contending that even if one assumes a conspiratorial relationship was established as between Coyle and King, on or before March 23, 1989, this finding simply would not automatically justify the admission of any and all statements and comments made by Val King to Coyle and Monaghan about Hubert Payne. Because the petitioner's "substantial rights" were adversely affected by the admissibility of this evidence, surely the magnitude of any error related thereto required a reversal.

Further, the Court will surely recognize that the co-conspirator exception to the hearsay rule, although not actually an exception because of the wording in Rule 801(d)(2)(E), relates to

issues that are distinct from the crime of conspiracy. Significant, too, is the fact that **Bourjaily v. United States, 483 U.S. 171 (1987)**, left open a critical question as to whether a trial court can make the required determination solely on the basis of what would otherwise be inadmissible hearsay. Id., at 181. Also, **Bourjaily** simply did not eliminate the requirement that the conspiracy required by 801(d)(2)(E) must still be shown to exist by a preponderance of the evidence. See **United States v. Mack, 837 F.2d 254 (6th Cir. 1988)** and **United States v. Pinto, 838 F.2d 426 (10th Cir. 1988)**.

Based on these insuperable tenets, we fully contend the admission of the assailed evidence (*e.g.*, Ante, pp. 6-7) cannot be squared with the critical holdings made in **Bourjaily**. See **United States v. Silverman, 861 F.2d 571, 576-577 (9th Cir. 1988)**. Another cogent point, made most clear in **Bourjaily**, is the cogent holding that 801(d)(2)(E) statements must be regarded as being presumptively unreliable. Id., 483 U.S., at 179.

Simply put, the exact holding to which reference is made was that all "out-of-court statements are presumed [to be] unreliable." Id., 179. This "unreliable" characterization was especially deemed critical by the Ninth Circuit in **Silverman, id., 861 F.2d, at 578**. Silverman also makes a further point that, in our judgment, truly must be reckoned with. Here the Ninth Circuit, in commenting on **Bourjaily**, expressly emphasized the idea that a presumptively unreliable statement would "standing alone" be an insufficient predicate for the admission of **801(d)(2)(E)** evidence. (Ibid.)

II. DUE PROCESS IS DENIED AN ACCUSED IN THE WAKE OF THE JURY'S CONSIDERATION OF AN EXTENSIVE QUANTITY OF EVIDENCE, THE ADMISSION OF WHICH CANNOT BE SQUARED WITH THE REQUIREMENTS OF RULE 801(d)(2)(E).

Because (as argued above) the Sixth Amendment's confrontation clause and the Hearsay Rule were not accommodated by the admission of the considerable testimony showing hearsay statements and comments by Val King that tended to incriminate

Hubert Payne, a new trial is required for this reason alone. Regardless of how it is phrased, the dispositive query here is: whether there existed as between Val King and Payne a conspiracy to launder money as charged in this indictment. Clearly, if the evidence in the Record failed to sufficiently establish that they were conspirators when Val King made the statements here being centralized, their admission cannot be ratified.

Now we readily admit that despite counsel's very best efforts, rendered as counsel for William Bourjaily, this Court in our judgment decreed that hearsay can in some instances justify its own admission. However, it is yet to be held that an alleged co-conspirator's statements alone can be regarded, as they were here, as sufficient evidence to permit, or justify, its own use.

Indeed, the point was well made in **Bourjaily** that there is still a requirement of independent evidence to establish the existence of the conspiracy and there is still a requirement that the defendant's membership therein must be proven by a

preponderance of the evidence, which evidence must corroborate the co-conspirator's statement before the statements can be submitted to the jury for its consideration. Id., **483 U.S., at 181.**

Ultimately counsel-opposite inferentially conceded that the acts and declarations of Jones, Williams, Frank Coyle and Val King made before Hubert Payne entered into an "agreement" (if an agreement resulted from the March 31 discussion) that is what it was with Coyle King and Monaghan were not admissible against Payne. This conclusion follows from the Government's conclusion remarkable contention that:

> The mere fact [that] the government did not argue the entire conspiracy, or all the evidence, or all the inferences cannot ... be interpreted as a change in theory or the abandonment of evidence introduced during its case.

(Government's Response To Defendant Payne's Motion For Judgment Of Acquittal Or A New Trial, p. 8.) As to this position, it is our view that it could not be clearer that the government cannot have it both ways. And, just as surely the

government cannot properly maintain that the evidence showing Coyle and Monaghan's involvement should be admitted on one theory and then make an argument that literally tells the jury such evidence was not relevant to the petitioner's guilt on the specific charges that were being submitted to them.

The above points aside, dealing with the critical facts here, it is at once obvious the admission of Monaghan's testimony that (on March 20) Frank Coyle related that Val King had told him Hubert Payne "would ... handle" Monaghan's money (Tr., pp. 135-136) cannot be justified or defended. Indeed, as argued above (Argument No. I), the admission of this testimony offended Payne's right of confrontation. By way of contrast, what is being specifically contended in this argument is that this evidence cannot be made to fit within the ambit of Rule 801(d)(2)(E).

Of course, it should be noted that what we have here is Monaghan testifying to something Frank Coyle (a double-hearsay declarant) told him Val King (a non-testifying declarant) had said

about Hubert Payne. Obviously if no conspiracy including Hubert Payne was then in existence, then clearly, by definition, at least as to Payne, these statements were not admissible. Next, the statements made by Val King to Monaghan on March 23, 1989 (Tr., 137) fall into the same category. This latter testimony has Val King (the non-testifying declarant) telling Frank Coyle on March 23, 1989 that Hubert Payne, who he described as an associate, "could handle" Monaghan's money (ibid).

Again, the law requires that "[b]efore admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a Court must be satisfied that the statement actually falls within the definition of the Rule. **Bourjaily, 483 U.S. at 175**. Further, where the facts preliminary to admission "are disputed, the offering party must prove them by a preponderance of the evidence" Id., 176.

In this case, as is being conceded, the conversations here involving Val King and Frank Coyle could very well show those

two had a conspiratorial relationship. But this fact can hardly be regarded as furnishing a basis for the admission against Hubert Payne of Val King's repeated hearsay reference to him. However, these references clearly do not qualify for admission of statements as defined in Rule 801(d)(2)(E).

III. EVEN ASSUMING CERTAIN INCONCLUSIVE DISCUSSIONS PARTICIPATED IN BY AN ACCUSED CAN BE SAID TO TRANSLATE INTO AN "AGREEMENT," PROOF THAT A WITHDRAWAL OCCURRED BEFORE THE FIRST OVERT ACT CHARGED IN THE INDICTMENT WAS CONSUMMATED IS A COMPLETE DEFENSE.

Hopefully the Court in assaying the varying aspects of the conversations had by Hubert Payne with Agent Monaghan, Val King and Frank Coyle on March 31, 1989, will reach the most obvious conclusion. The conclusion we contend that more easily describes, or characterizes, these conversations is to say that they were clearly inconclusive discussions that laid a framework for a possible working relationship between the parties. This insuperable fact magnifies the reason for the "overt act"

requirement in the conspiracy law here under consideration. Indeed the requirement addresses the hope that one could not possibly be found guilty on the basis of even a clear-cut agreement, particularly one that is supported only by vague proof as to a basic element of the charged offense -- the case here.

If nothing else, proof of an overt act demonstrates the conspiracy is operative and it cannot be denied "the overt acts alleged in the indictment and proved at trial mark the duration [and in this case the inception] of the conspiracy." **United States v. Davis, 533 F.2d 921, 929 (5th Cir. 1976)**. Also see **United States v. Walls, 577 F. Supp. 772 (N.D. Ga., 1984)**. Also Devitt & Blackmar, Federal Jury Instructions, §27.09 (West, 1977).

The upshot of what is being contended here is that if we credit the contention that the earliest point at which an agreement including Hubert Payne could have been reached was on March 31, 1989, then clearly the facts show Payne withdrew before any

conspiracy including him was formed. Further, it could not be more obvious that Payne's withdrawal was fully endorsed and accepted by the jury as having occurred before April 4. This fact follows from Payne's acquittal on the substantive offense in Count 3 alleged to have occurred on April 12, 1989. This being so the importance of the critical overt act, which was alleged to have occurred on April 4, 1989, really makes our point. This is so because it is the first (or next) overt act alleged to have occurred after March 31, 1989.

Postured then by the fact that the withdrawal evidence clearly shows it occurred before April 4, 1989, when the next alleged overt act took place, the conclusion is inescapable that Payne could not be guilty of being a party to the conspiracy alleged against him.

IV. WHERE THE FACTS, AT LEAST ARGUABLY, SHOW THAT (AT MOST) THE "AGREEMENT" ELEMENT OF A TITLE 18 CONSPIRACY WAS REACHED ON A PARTICULAR DATE (HERE, MARCH 31, 1989) AND THE PROOF SHOWS ONE OF THE PARTIES TO SUCH

"AGREEMENT" WITHDREW BEFORE THE NEXT "OVERT ACT" CHARGED IN THE INDICTMENT WAS ALLEGED TO HAVE OCCURRED (HERE APRIL 4, 1989), THE EVIDENCE WOULD BE INSUFFICIENT TO SUPPORT A CONVICTION OF THE PERSON WHO WITHDREW.

With reference to Hubert Payne's defense of withdrawal, it is clear enough the jury had to have agreed the defense of withdrawal was maintained. Since withdrawal under the facts here could only have occurred when Payne says it did -- that is, on March 31, 1989, shortly after the meeting at the Hopkins Airport, then clearly anything that occurred after this withdrawal occurred would be outside the parameters of Payne's involvement.

So postured, the situation here can be analogized to what occurs when the withdrawal issue turns on the resulting effect of the relationship of the statute of limitations to this defense. What it is that should be analogized, in the context of this case, is the effect of the terminal point imposed by a statute of limitation and an effective withdrawal. This, of course, follows since it could

not be clearer that once the proof of withdrawal is established, any involvement of the person who withdrew would end as to him and he would from that point on be out of the picture. See **United States v. Purvis, 544 F. Supp. 68, 70 (S.D.N.Y. 1982).**

As to Payne, the point would be that any participation by him was complete when he withdrew, as the jury concluded he did. If that occurred (as argued above) before the overt act requirement was met, then it follows he never became a conspirator. Thus, it would follow the guilty of conspiracy verdict would be invalid, which is what we are contending.

Simply put, the focus here has to be on the "overt act" as charged and shown to have occurred on April 4, 1989. Cf., **United States v. Head, 641 F.2d 174, 177 (4th Cir. 1981),** where it was the date of an alleged "overt act" that determined whether the offense charged fell within a statute of limitations. Also see **United States v. Butler, 792 F.2d 1528, 1531-1533 (11th Cir. 1986).** If our analysis is valid, then clearly the

dispositive tenet here mandated that Hubert Payne was entitled to an acquittal if his withdrawal occurred before any overt act charged as having taken place (in furtherance of any agreement he was a party to) was consummated. Support for our thesis, in this regard, is supplied by such cases as **United States v. Karr, 742 F.2d 493, 497 (9th Cir. 1984)**, which specifically held, citing **United States v. Monroe, 552 F.2d 860, 864 (9th Cir. 1977)**, that: "to avoid complicity in a conspiracy, one must withdraw before any overt act is taken in furtherance of the agreement." Also see **United States v. Sarault, 840 F.2d 1479, 1487 (9th Cir. 1988).**

V. WHERE THE ISSUE AS TO WHETHER THERE WAS A WITHDRAWAL FROM A TITLE 18 CONSPIRACY IS RAISED AND IS SUBMITTED TO THE JURY, THE COURT MUST GIVE INSTRUCTIONS THAT WOULD REQUIRE THE JURY TO FIND THE GOVERNMENT DISPROVED THE DEFENSE BEYOND A REASONABLE DOUBT.

Here the Record shows counsel requested the Court to

charge the jury that where (as here) there was evidence of withdrawal "the government has to disprove withdrawal beyond a reasonable doubt." **(Tr., Vol. III, p. 1005.)** This request was summarily denied (ibid).

In taking the position that once the accused satisfies his burden of production on the issue of withdrawal the government has the burden of persuasion on that issue, we do recognize, as did the Appeals Court, that contrary authority does exist in some circuits. Also see **Martin v. Ohio, 480 U.S. 241 (1987).**

At the helm of the cases that have adopted the position here being contended for is **United States v. Read, 658 F.2d 1225 (7th Cir. 1981).** **Read**, in overruling prior cases decided in the Seventh Circuit, specifically held that the government must disprove withdrawal beyond a reasonable doubt. Id., 1236-1237. Other cases that have adopted this thesis are **United States v. Piva, 870 F.2d 753, 756-757 (1st Cir. 1989)**; **United States v. Jannotti, 729 F.2d 213 (1984)** and **United States v. Steele, 685**

F.2d 793, 803-804 (3d Cir. 1982).

The upshot of the above cases is that for the jury to acquit, on the basis of the withdrawal defense, the jury need only have a reasonable doubt on the withdrawal issue. This determination is to be distinguished from a "finding" that the defendant withdrew. The importance of this distinction lies in the compelling fact that under the formulation here being contended for, if the evidence is in equipoise on the issue of withdrawal the accused must be acquitted. Under the other formulation, the one that was submitted to our jury, the opposite verdict was actually mandated. Simply stated the jury was told to convict even if they found it was just as likely that Hubert Payne did in fact withdraw as it was that he did not.

The response of the Court of Appeals to the above contention is encapsuled in the following quote from that Courts Opinion. Here it was stated:

> Defendant Payne essentially is asking this court to reverse the precedent of this circuit in regard to this

> issue. This court places the burden of proof for withdrawal from a conspiracy on the defendant as stated in **United States v. Lash, 937 F.2d 1077, 1083 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 397 (1991).** We see no reason for requesting an en banc panel of this court to reconsider this opinion, as defendant wishes, because it is consistent with the opinions of other circuits. See, e.g., **United States v. Cardall, 885 F.2d 656, 668 n. 22 (10th Cir. 1989); United States v. Walker, 796 F.2d 43, 49 (4th Cir. 1986); United States v. Boyd, 610 F.2d 521, 528 (8th Cir. 1979), *cert. denied*, 444 U.S. 1089 (1980).**

Opinion, Appendix "C", at p. A-46.

In specifically dealing with the obvious conflict between its decision on this burden of proof issue and the contrary decision rendered in other circuits, it is worthy of noting that the Court also rejected, rather summarily the position it had taken on a comparable (burden of proof) issue in **United States v. Guyon, 717 F.2d 1536 (6th Cir. 1983).** Indeed, in *Guyon*, the Sixth Circuit expressly approved the instructions given in that case, which required the Government to "prove beyond a reasonable doubt that the defendant did not act in self-defense," id., 717 F.2d,

at 1541.

With reference to this and related points we incorporate by reference, the detailed arguments made on this point in the "Petition for Rehearing." See Appendix "B", pp. A-3 - A-25.

In our judgment, it is due process which requires this Court to adopt the rationale of those cases which view it as a requirement that the government "must rebut the prima facie showing [of a withdrawal] either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal." **United States v. Steele, 685 F.2d, at 804.**

VI. WHERE THE PROOF FAILS TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT THE TRIAL COURT IS REQUIRED TO GRANT A MOTION FOR JUDGMENT OF ACQUITTAL.

The bottom line for which we are contending is that Hubert Payne was not shown beyond a reasonable doubt to have conspired with anyone. This conclusion is fully augmented by the lack of

any proof that Hubert Payne was involved in any of the specific transactions relied on by the government. The question then is: was it reasonable for the jury to credit Frank Coyle's naked, totally uncorroborated and self-serving, testimony that Hubert Payne delivered to him at his building the $25,000.00 check which was the result of the $25,000.00 given Val King by Monaghan.

Now, apart from the credibility problems one would naturally have with Frank Coyle's testimony, the fact that he was so thoroughly impeached to the extent that he was surely makes the jury's acceptance of his testimony most unlikely. Additionally, it is indisputable that Frank Coyle had originally told the agents that Payne was driving "his Jaguar" when he supposedly delivered the check. The upshot of this is, there is nothing in Coyle's evidence that could have provided a sufficient foundation for the jury, in spite of Coyle's total impeachment,[3] to conclude beyond

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[3] *Coyle's impeachment was not limited to the testimony concerning the Jaguar. Indeed, the Record here shows him to have been motivated by reasons other than to tell the truth.*

a reasonable doubt that he was nonetheless worthy of belief.

Postured by the above evidence, it is being contended that even if this evidence is considered in the light most favorable to the government, and even if the government is given the benefit of any and all the reasonable inferences that can arguably be drawn from his testimony, still there is simply no way any reasonable jury should have reached the conclusion beyond a reasonable doubt that Coyle was worthy of belief. Postured by the above analysis what is being argued is that even if this evidence is considered in the light most favorable to the government, and even if the government is given the benefit of any and all the reasonable inferences that can be arguably drawn from his testimony, still there is simply no way any reasonable jury should have reached the conclusion beyond a reasonable doubt that Hubert Payne was guilty of having conspired with anyone. This conclusion is especially cogent here since actual participation is needed as an element of any conspiracy charge. And, proof of a particular

individual's participation as a member of the charged conspiracy can only be established on the basis of his "actions and reactions to the circumstances." **United States v. Barrett, 933 F.2d 355 at 359 (6th Cir. 1991).**

This case also brings into play other critical aspects of this Court's **Bourjaily** decision. To be sure **Bourjaily** recognizes there is a serious distinction between the significance of evidence admitted under Rule 104 (in order to satisfy the requirements of Rule 801[d][2][E]) and evidence required to prove the crime of Conspiracy (18 U.S.C., §371). Aside from the fact that in the former instance, we are only talking about the admission of evidence as prima facie proof of a conspiracy, in the latter instance we are talking about proof sufficient to support a finding of guilt itself. In the first instance, the burden of proof is by the preponderance of the evidence whereas the burden of proof is beyond a reasonable doubt with reference to the conspiracy offense itself.

Now, the government will probably argue that evidence admitted to satisfy the condition precedent requirements of Rule 801(d)(2)(E) can also be regarded as substantive proof of the charges themselves. If this is done, it will at once be obvious that counsel would be ignoring certain realities. This follows because nothing will be cited as providing even an arguable basis for this farfetched position. Additionally, it will verify that counsel either did not read the **Bourjaily** case, or (if he did) he simply failed to understand it or was confounded by it.

Here, it is worth repeating that **Bourjaily** made the very significant point that "the evidentiary standard [for the admission of evidence under 801(d)(2)(E)] is unrelated to the burden of proof on the substantive issues" (**id., at p. 175**). Simply put, the critical point here being contended for was well made in **Bourjaily** when the Court stated, and this is worth repeating, "the evidentiary standard for [Rule 801(d)(2)(E)] is unrelated to the burden of proof on the substantive issues" (ibid). (Emphasis supplied.)

So postured, even if the evidentiary standard for the admission of the challenged 801(d)(2)(E) evidence was properly met, it is a non sequitur to argue (because it does not follow) that Hubert Payne was therefore proven guilty of the charged conspiracy offense beyond a reasonable doubt. Again, the point to be made is that for a considerable quantity of the evidence here being assailed to be admissible, under Rule 801(d)(2)(E), the proof must show the existence of a conspiracy that included the declarant (Val King) and Hubert Payne, the party against whom the evidence is admitted. With reference to the Title 18 Conspiracy offense, the proof required the establishment of that relationship beyond a reasonable doubt. See, **United States v. Gill, 604 U.S. 546 (7th Cir. 1979)** and **United States v. Trowery, 542 F.2d 623 (3d Cir. 1976)**. In Gill, the Court emphasized the precise critical point here being contended for. Simply put, it was held that "the co-conspirator exception to the hearsay rule ... is merely a rule of evidence founded, to some extent, on the concepts of agency law,"

id., 549 (citing **United States v. Trowery, supra, p. 626**).

A further aspect of the distinction (between the admission of statements under Rule 801[d][2][E] and the quantum of proof required for a conviction) is the insuperable fact that a member of the charged conspiracy (here, Frank Coyle and Val King) may not make another person a member simply by saying so. In a nutshell, Hubert Payne cannot be said to have been proven to be guilty simply because he was said by Val King to have been interested in dealing with Monaghan.

Distilled, what we are saying is that while the existence of a conspiracy, in an evidentiary sense, can include declarations admitted under Rule 801[d][2][E] (along with other evidence showing the statements and acts of all the alleged conspirators) "a particular defendant's membership in ... [such] conspiracy, if any, must be based on evidence limited to that defendant," **United States v. Ortiz, 883 F.2d 515, 521 (7th Cir. 1989)**. This being so, it follows that the Court is required to review the sufficiency

of the evidence with reference to Hubert Payne's conviction solely on the basis "of what he did or said" (ibid). See **United States v. Brown, 335 F.2d 170, 172 (2d Cir. 1964)** and **United States v. Esparza, 876 F.2d 1390, 1393 (9th Cir. 1989)**.

The cogency of the points here being made becomes even more manifest when one realizes that if a jury is only permitted to find the membership/participation elements on the basis of the defendant's own actions and words, then clearly the fact that Payne himself was not shown to have done anything prior, or subsequent, to the March 31, 1989 meeting inexorably dictates the required position. In a nutshell this Court should credit the particular arguments made in this segment of our Petition.

VII. ONE SENTENCED UNDER THE GUIDELINES CANNOT BE DENIED THE "ACCEPTANCE OF RESPONSIBILITY" CREDIT SIMPLY BECAUSE OF HIS TRIAL TESTIMONY THAT THE THINGS HE DID AND SAID DID NOT QUALIFY HIM FOR CONVICTION, WHERE IN THE WAKE OF THIS TESTIMONY HE IS ACQUITTED OF ONE OF THE TWO CHARGES HE FACED AT TRIAL.

Here we are contending the trial Court erred by improperly denying Hubert Payne credit for accepting responsibility and not awarding him the two-level sentence reduction provided for under U.S.S.G. §3E1.1. In our view the conclusion one gets from the Court's expressed comments in denying this adjustment is that the Court somehow convinced herself the "acceptance of responsibility" award could not be given to one who testified in his own trial. Here our reference is to the Court's express reference to the segment of the commentary to this section, which reads that it may be awarded, e.g., "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt ...." (**Sentencing Transcript**, p. 26.) The clear message sent by this statement is that Payne was not disqualified from any entitlement to this consideration because he testifies in his own defense.

Aside from the fact that surely the law cannot be that Payne can be punished because he raises an affirmative defense to the charges against him and testifies his conduct was not criminal, the

trial court's expressed notion ignores the fact that clearly Payne never testified to anything that was not ultimately validated by the jury's obvious acceptance of his version of the events in which he was personally involved. Clearly then, as bad and as unfair as these Guidelines are, surely this Court will not endorse an interpretation of them that would affirmatively penalize one who offers a defense, even a technical one, to the government's charges. If such is not to be the case, then this is surely the case in which that point should be made loud and clear.

VIII. WHERE THE FACTS BEARING ON "THE OFFENSE OF CONVICTION" CLEARLY SHOW A DEFENDANT'S PARTICIPATION MADE HIM SUBSTANTIALLY LESS CULPABLE AND (AT WORSE) ONLY BARELY CULPABLE, A FAILURE TO DOWNWARDLY ADJUST THE REQUIRED SENTENCE MUST BE REGARDED AS CLEARLY ERRONEOUS.

The position here being taken is that the District Court's refusal to award the mitigation adjustment sought by Hubert Payne was clearly erroneous. This follows here because when one looks

at the very slight role Hubert Payne played, even if it can be deemed criminal, when it is compared with the roles of those he must then be regarded as having conspired with (i.e., Frank Coyle and Val King), surely this Court, on the basis of its consideration of "the entire evidence ... [, will be] left with the definite and firm conviction that a mistake has been committed." **United States v. U.S. Gypsum Co.**, 333 U.S. 364, 395 (1948).

This follows because, once the Court credits the stated purpose for the downward departure required by U.S.S.G., §3B1.2, this conclusion is really inescapable. Here our reference is to the fact that the commentary to this Guideline expressly provides that its aim was to benefit a defendant "who plays a part in committing the offense that makes him substantially less culpable than the average participant" (ibid).

Obviously Payne's asserted participation must be properly viewed by comparing his role with the participation of Coyle and Val King. This will show he was substantially less culpable than

they were. Id., Comment (n. 1). On the other hand, it is recognized that the "minimal" designation was not intended to be frequently used. Still it is a fact that Payne, if culpable at all, should only have been regarded as a minimal participant -- as was specifically contended to be the case in the District Court.

The starting point here is with the "elements of the offense of conviction," which controls whether an adjustment is warranted. Here the offense of conviction is only that of conspiracy (a Title 18 conspiracy -- not a Title 21 conspiracy). Further, Payne was acquitted of the only substantive offense with which he was charged. His co-defendant at the trial was convicted of the charged substantive offense and his other alleged co-conspirators (Frank Coyle, Ralph Jones and Ferris Williams) not only admitted to their guilt, but also to charges far more extensive than the one charge this petitioner was convicted of.

As additional support for our contention, that the ruling denying Hubert Payne the designation of minimal participant, we

rely on the cogent expression of our position in **United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989)**. There the Fourth Circuit noted that in deciding whether a downward adjustment for a "role in the offense" is warranted, the determination is made "by measuring each participants indicated acts and relative culpability against the elements of the offense of conviction." Id., 216 (Emphasis supplied). Had these factors been appropriately dealt with here, then clearly Hubert Payne's sentence would surely have been different.

CONCLUSION

For all the various reasons argued above, this cause should be reviewed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 21 1992
OFFICE OF THE CLERK

92-517

NO._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HUBERT PAYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX "A"

Nos. 91-3417/3588/3624

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	**O R D E R**
	)	
HUBERT PAYNE (91-3417/3624),	)	
VAL C. KING, (91-3588),	)	
	)	
Defendants-Appellants.	)	

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; and CONTIE, Senior United States Circuit Judge.

The court having received a petition for rehearing enbanc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing

and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 91-3417 & 91-3624

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HUBERT PAYNE,

Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

PETITION FOR REHEARING IN BANC AND SUGGESTIONS FOR REHEARING IN BANC

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied

professional judgment, that the panel decision is contrary to the decision of the United States Court of Appeals for the Sixth Circuit in ***United States v. Guyon, 717 F.2d 1536 (6th Cir. 1983)***. Further, the Opinion cannot be reconciled with that rendered by the United States Supreme Court in ***Martin v. Ohio, 480 U.S. 228 (1987)***, upon which it purports to rely. Also, the position taken by the panel conflicts with that adopted by the Court in the Sixth Circuit's ***Pattern Criminal Jury Instructions, Nos. 6.02, 6.03, 6.05 and 6.06***.

Clear also is the fact that the panel's decision on the hearsay/confrontation issue, although asserted as being within the ambit of ***Griffin v. United States, ___ U.S. ___, 112 S. Ct. ____ (1991)***, cannot be justified on that basis. In all this, we submit there is a need for the entire Court to revisit the 801(d)(2)(E) issue as postured herein. For it seems obvious enough from the panel's analysis that one can be made a conspirator, and thus vulnerable to statements attributed to him before there is any satisfaction of

the agreement element requirement for a title 18 conspiracy. The reference here is to the panel's statement that King's statement to the agent that Payne was willing to launder his money was admissible against Payne because Payne came to a meeting and the matter was discussed. (Opinion, pp. 10-11.)

Simply put, the position taken by the panel on this point cannot be justified by anything said by the Supreme Court in ***Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775 (1987)***, or in this Court's ***Bourjaily*** decision. (781 F.2d 539 [6th Cir. 1986].)

JAMES R. WILLIS, ESQ.
Reg. No. 0032463

Attorney of record for:
HUBERT PAYNE -- APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 91-3417 & 91-3624

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HUBERT PAYNE,

Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

PETITION FOR REHEARING IN BANC AND SUGGESTIONS FOR REHEARING IN BANC

Hubert Payne, the appellant herein, petitions the Court under favor of Rule 40, Federal Rules of Appellate Procedure, for

a Rehearing In Banc of his appeal. Further, the appellant makes the clear and unequivocal Suggestion (as is permitted by Rule 35) that this cause should be considered in banc by the entire Court.

In support of this Petition for Rehearing and the Suggestion, the following specific contentions are made:

(1)

That as argued below, it is apparent from a reading of the panel's decision material facts, established by undisputed evidence in the Record, have been overlooked, misapprehended and misapplied. These include the following specific findings that only by the exertion of an extreme torturing can be justified by anything in the Record. Here our reference is to the following statements isolated from the panel's Opinion:

> (a) "During the trial of defendants Payne and King, those who pled guilty, Coyle, Williams, and Jones testified against defendants Payne and King on the government's behalf" (Opinion, p. 4).
>
> (b) "In regard to defendant Payne,

he first argues that the statements which co-conspirator King made prior to March 20 and March 23, 1989 were statements made before he entered into the conspiracy and were improperly admitted as co-conspirator statements against him." (Id., p. 10.)

(c) "Defendant King told Monaghan that ... Payne had agreed [past tense] to launder the officer's cash." (Id., p. 3).

(d) "Defendant Payne ... stated he would give [future tense] the officer certified checks if the officer wanted them" (ibid). (Emphasis supplied.)

(e) "Defendant Payne told the officer he [actually] had several ways to launder the cash, but the best way was through a business that could be set up [future tense] to accept large sums of cash. And, that although he controlled [past tense] the business the business could not [present tense] be traced to him" (ibid).

(f) "Defendant Payne ... stated the laundered cash would be returned [future tense] to the officer in the form of a check. Defendant Payne gave the officer his business card ...

and Defendant King's home telephone number[] in order that the officer could contact them [in the future] when he was ready to launder his cash" (ibid).

(g) After King received the $25,000 in cash from the officer he "telephoned Defendant Payne .... and .... drove immediately to the residence of Defendant Payne" (id., p. 4). No evidence exists to show King talked to Payne, or the evidence only showed King drove to the vicinity of Payne's residence, which was in a large apartment building."

(h) "The jury also credited the testimony of Defendant Coyle over that of Defendant Payne that Payne did not withdraw from the conspiracy as he alleged" (id., 13). (If nothing else the fact that Payne was acquitted of the substantive offense, simply cannot be translated into anything other than a rejection of Coyle's testimony that Payne gave him the $25,000 check Coyle testified was delivered to him on April 18, 1989.) On this point see **United States v. Guyon, 717 F.2d 1536 (6th Cir. 1983) (Jones, J. dissenting opinion, id., at p. 1545,**

> **fn.1).** Our point here is that in ***Guyon*** this Court did not hesitate to interpret the verdict rendered therein in spite of the presence of a serious flaw in the jury instructions."
>
> (i) "In regard to Defendant Payne, acquittal of the substantive offense does not constitute a determination that no overt act was committed ...." (id., 13). While this is certainly true, it is also true that the acquittal could only mean the jury concluded that Payne withdrew at some point.

(2)

That clearly, as the panel's decision shows there is a conflict, a serious one at that, between the position asserted by this Court in **United States v. Lash, 937 F.2d 1077 (6th Cir. 1991)**, and in the panel's decision which adopts and endorses without analysis the views expressed in the Fourth, Tenth, and Eighth circuits. (See Opinion, p. 12.)

Specifically our reference here includes the panel's summary rejection of our burden of proof contentions that were made in connection with its rejection of the withdrawal defense

raised by this appellant. Here it was stated:

> Defendant Payne essentially is asking this court to reverse the precedent of this circuit in regard to this issue. This court places the burden of proof for withdrawal from a conspiracy on the defendant as stated in **United States v. Lash, 937 F.2d 1077, 1083 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 397 (1991).** We see no reason for requesting an en banc panel of this court to reconsider this opinion, as defendant wishes, because it is consistent with the opinions of other circuits. See, e.g., **United States v. Cardall, 885 F.2d 656, 668 n. 22 (10th Cir. 1989); United States v. Walker, 796 F.2d 43, 49 (4th Cir. 1986); United States v. Boyd, 610 F.2d 521, 528 (8th Cir. 1979), *cert. denied*, 444 U.S. 1089 (1980).**

Opinion, p. 12.

The point to be considered, and what it is that makes for the open conflict which should have been given more than passing consideration by the panel (and which should command the attention of the entire Court), is that there are at least as many

circuits that have carefully considered and categorically rejected the position expressed by this circuit in ***Lash*** and rotely adopted herein as being dispositive. Our reference here is to **United States v. Reed, 729 F.2d F.2d 1225 (7th Cir. 1981); United States v. Piva, 870 F.2d 753, 756-757 (1st Cir. 1989)** and **United States v. Jannotti, 729 F.2d 213 (3rd Cir. 1984).**

Of no mean significance is the contention that was specifically made to the panel, in our Reply Brief. There it was argued that surely "the law cannot continue to be less than uniform in the federal system" and for that reason this Court's views on this issue "should be more fully ventilated" (id., p. 12). Despite this plea, the panel expressed an unwillingness to "request[] an en banc panel of this Court to reconsider ... [this circuit's position, as expressed in ***Lash***] because it is consistent with the opinions of other circuits" (id., at 12). In our judgment, it would have made at least as much, if not more, sense for the panel to have recommended an en banc decision because of the open conflict in

circuits on this issue. For clearly the fact that other Courts have as forcibly expressed a contrary view on such a critical issue makes for the need, as we see it, for the approval by a majority of the Judges on this Court of the views expressed for it -- if indeed this Opinion is to be the law of this Circuit.

Here, as we see it, the conflict to which we have made reference could not be more aptly postured than it is when the views expressed by this Court, in ***Lash*** and by our panel in reliance thereon (in which the views of the Tenth, Fourth and Eighth Circuits were extolled), are compared with the categorical position taken by the Seventh Circuit in **United States v. Read, 658 F.2d 1225 (7th Cir. 1981)**. In ***Read***, the Court in over-ruling that Court's prior case law, declared that the government must disprove withdrawal when the issue is properly raised. Id., at 1233-1237.

Further, it should be noted, the point here being contended for was specifically argued to the panel that originally heard this

case. This was done in the following precise language:

> [That contrary to the position taken by the Government in its Brief] Payne never testified he withdrew from any conspiracy. What his evidence showed was that no conspiracy including him was ever formed. And, that to the extent it can be said an agreement was reached on March 31, 1989, he withdrew from being a party to any such agreement before the April 4, 1989 Overt Act that would have reopened any possible agreement into a conspiracy was committed.

Reply Brief, p. 11. (Emphasis supplied.) On this same point, consider the fact that the Eleventh Circuit's Pattern Instruction clearly magnifies the conflict we contend needs to be addressed. Simply put then, if its basic thesis, upon which we rely, is invalid that rejection should have the imprimatur of the full court -- not merely that of those on the panel that rendered the Opinion here being challenged. Here the instruction relied on reads:

> If a Defendant enters into a conspiracy agreement but later changes his mind and withdraws

> from that agreement before anyone has committed an "overt act," as previously defined, then the crime was not complete at that time and the Defendant who withdrew cannot be convicted -- he would be not guilty of the alleged conspiracy offense.

Eleventh Circuit's Pattern Instruction, No. 513. Also see ***Ninth Circuit's Pattern Instruction, No. 8.05 D.*** Still other cases that have adopted a view contrary to the position taken in this Court would include **United States v. Jimenez, 622 F.2d 753, 755 (5th Cir. 1980)** and **United States v. Heathington, 545 F.2d 972 (5th Cir. 1977).** ***Heathington*** makes the point, in language that is especially apt here, that the withdrawal must occur prior to the consummation or completion of the offense by the occurrence of an overt act.

So postured, as we see it, a major flaw in the panel's opinion flows from its conclusion, premised as it is on the flawed notion that "Defendant Payne testified that Defendant King brought him into the money laundering conspiracy" (Opinion, p. 4). The

most that can be said for this indefensible assertion is that it shows, in our judgment at least, the author of the panel's opinion has simply misread the Record. If not that, he has surely misapprehended the position taken by the appellant.

Aside from exposing the sheer patency of the gross defect involved in the Court's failure to credit the fact that to convict one of a Title 18 conspiracy, the "overt act" that brings it into fruition must be specifically charged in the indictment, the quoted statement is indefensible for other equally cogent reasons. This point was well made in our original Brief where it was argued that "proof of an Overt Act [is what] demonstrates the conspiracy is operative and it cannot be denied the overt acts alleged in the indictment and proved at trial mark the duration (and inception) of the conspiracy." Appellant's Opening Brief, p. 37. Cited in support of this cogent and unassailable thesis was **United States v. Davis, 553 F.2d 921 (5th Cir. 1976); United States v. Walls, 577 F. Supp. 772 (N.D. Ga. 1984)**; and **Devitt & Blackmer,**

Federal Jury Instruction, §27.07 (West 1977).

Hopefully the law in this Circuit is, as it is elsewhere, that a Title 18 Conspiracy is only established on the basis of (1) the allegation of and proof of, both an agreement and an "overt act" in furtherance of such agreement. Obviously if the conspiratorial agreement was reached at the March 31st meeting and Payne withdrew (from this agreement) before an alleged overt act was committed (i.e., April 4th), then as to him the charged conspiracy was never formed.

So postured, telling us, as the panel does, that Payne testified he met with the undercover agent, and was told by him that the source of his money was drugs,[1] and that Payne discussed how such money could be laundered, at most could only satisfy the agreement element required for a Title 18 Conspiracy. The point being made inexorably leads to the next serious flaw in the

---

[1] **Granted, Payne did testify that he was told Drugs were the source of the money involved. However, not unlike what the agent admitted he was doing, he (Payne) simply kept the conversation going by feeding into it. This he did so as to keep King's options open if that was what King wanted to do.**

ratiocinations relied on by the panel in its Opinion. The reference here is to the author's statement that "Payne testified he withdrew from the conspiracy following the March 31, 1989 meeting" (Opinion, pp. 4-5). (Emphasis supplied.)

Aside from the fact that any such testimony easily translates into a confession, or at least a judicial admission of guilt of the charge for which he was convicted; it also verifies the Court has simply missed the point of Payne's testimony and his defense. For if it were otherwise the Court would have realized, assuming Payne's testimony showed he fully agreed to launder the agent's money in the future, an alleged "overt act" had to be proved for a conspiracy to come into being.

This latter thesis is magnified by the panel's further position that can be read as endorsing our position that there was no proof Payne joined, or even talked of joining, an existing conspiracy (id., pp. 11-13). Indeed, it is really significant to note the Court was willing to credit our contention that any prior

existing conspiracy as between King, Coyle, Williams and Jones was not shown to have included Payne (Opinion, pp. 11-12). What further emphasizes the flaw here being centralized is the fact that **Griffin v. United States, 112 S. Ct. 466 (1991)**, was cited in the Opinion as support for the position taken. (Opinion, pp. 11-12.) In our judgment, the reference to ***Griffin*** is really instructive. For it magnifies the extent to which Payne has been victimized. This follows because, as the Supreme Court recognized, ***Griffin*** involved a conspiracy that alleged multiple purposes. In our case, the conspiracy alleged only involved one purpose and that was to launder the agent's money.

This being so, once the panel agreed Payne had to be separated from the King, Coyle, Williams and Jones venture, it should have also recognized the critical need for a determination as to when the agreement element occurred. And the panel should have identified the "overt act" alleged in the indictment that occurred before Payne withdrew. This follows because the jury

obviously agreed a withdrawal occurred. Indeed, if it were otherwise they would have convicted Payne of the substantive offense.

(3)

Next, it should not get past the Court that the panel's decision can be read as a categorical rejection of the position expressed by this Court in countless cases -- *i.e.*, that the Government has the burden of rejecting affirmative defenses and this by proof beyond a reasonable doubt. This being so, the panel's unequivocal statement that "the Sixth Circuit's position of placing the burden of proof for affirmative defense is consistent with the Supreme Court's decision in **Martin v. Ohio, 480 U.S. 228 (1987)**" (Opinion, p. 12) is hardly something that can be written off as a mere dictum. Indeed, the statement itself even conflicts with this Circuit's Pattern Instruction Nos. 6.02, 6.03, 6.05 and 6.06. Also see **United States v. Guyon, 717 F.2d 1536 (6th Cir. 1983).**

Of significance here, both, ***Guyon*** and ***Martin v. Ohio*** (relied on by the panel) were homicide cases that had been defended on the grounds of self-defense. In ***Martin*** the Supreme Court approved the instruction, given in that case, that to prevail on the issue of self-defense the accused must actually prove his (or her) innocence. By way of contrast, in this Court's ***Guyon*** decision, the Court expressly approved the instruction (given in that case), which required the Government to "prove beyond a reasonable doubt that the defendant did not act in self-defense." ***Guyon, 717 F.2d at 1541***. Clearly then, the panel's decision in this case cannot be reconciled with, either the position taken in ***Guyon***, or the position articulated by the Supreme Court in ***Martin***.

On this cogent point, one need only note that in ***Martin*** the Court's opinion emphasized the fact that Ohio had by statute (**R.C. of Ohio, §2901.05[A]**) regulated the use of affirmative defenses by placing the burden on the accused who relies on self-defense. The

upshot of this is that there was a statute involved in ***Martin*** and it was this statute that caused the Court to rule that due process was not violated in spite of the fact that it allowed the jury to convict one of murder when it was just as likely the killing occurred in self-defense. (***Martin, 480 U.S. at 233-244***.) Congress, it should suffice to say, did not enact any comparable legislation. This fact alone makes our point.

All this makes for a very real need that this Court should put to rest the confusion that will flow from the assailed declaration made by the panel -- to which reference is made. For if ***Martin v. Ohio*** is consistent with this Court's "position of placing the burden of proof for affirmative defenses on the defendant" (Opinion, p. 12 [Emphasis supplied]), then clearly the burden of proof issue addressed by this Court in ***Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980)***, must be regarded as resolved against the position taken by a majority of the members who participated in that case.

Our position (that the panel's reliance on ***Martin v. Ohio***, for its position on the burden of proof issue is flawed and portends problems if not forthrightly rejected) is magnified by the concerns seriously registered by Chief Judge Edwards, in ***Isaac v. Engle***. There he noted that "few cases in the history of this Court resulted in as much soul searching, thought and debate [as the burden of proof issue as postured by that case]" 646 F.2d 1129, 1136 (6th Cir. 1980). Also see ***White v. Arn, 788 F.2d 338 (6th Cir. 1986)***; ***Wilson v. McMacken, 786 F.2d 216 (1986)***; ***Neib v. Jago, 695 F.2d 288 (6th Cir. 1982)***; ***Hopper v. Perini, 641 F.2d 445 (6th Cir. 1981) and Carter v. Jago, 637 F.2d 449 (6th Cir. 1980)***.

(4)

Clearly the need for this Court to speak with a unified voice could not be more apparent than it is in this case with reference to the burden of proof issues discussed above. Also, it seems equally clear that the panel's reliance on ***Griffin v. United States***, ___ ***U.S.*** ___, ***112 S. Ct. 466 (1991)***, is likewise sorely

misplaced. For clearly the Court has misconstrued its effect as applying to a situation where only one conspiracy is charged which distinguishes the situation here from the situation in ***Griffin***.

The bottom line on this point is that the panel overlooked this critical point and for that reason misapplied a principle that was created in ***Griffin*** and which obviously was not the basis for the trial Court's position -- a position that clearly prejudiced this appellant.

CONCLUSION

For the various reasons argued above this cause should be given the benefit of a Rehearing. In our view the Rehearing should be conducted by the full Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition For Rehearing In Banc ... were mailed to the office of Ronald Bakeman, Assistant United States Attorney, 1404 East Ninth Street, Suite 500, Cleveland, Ohio 44114, this _____ day of May, 1992.

_____

JAMES R. WILLIS, ESQ.
Reg. No. 0032463
Attorney for Appellant

Appendix "C"

Nos. 91-3417/3588/3624

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

United States of America *Plaintiff-Appellees,*	:	
v.	:	ON APPEAL from the United States District Court for the Northern District of Ohio
Hubert Payne (91-3417/3624), Val C. King (91-3588), *Defendants-Appellants.*	:	

Decided and Filed May 5, 1992

Before: **NORRIS** and **SUHRHEINRICH**, Circuit Judges; and **CONTIE,** Senior Circuit Judge.

Defendant-appellant, Val C. King, appeals his conviction and sentence for violation of 18 U.S.C. § 371 for conspiracy to defraud the United States by laundering money and of 18 U.S.C.

§ 1956 for money laundering. Defendant-appellant, Hubert Payne, appeals his conviction and sentence for violation of 18 U.S.C. § 371 for conspiracy to defraud the United States by laundering money. For the following reasons, we affirm.

I.

In spring 1988, the IRS received information from an FBI informant that Frank Coyle, a Cleveland stockbroker and John McCurley, a drug dealer, were involved in money laundering. The IRS decided to initiate an undercover sting operation into the money laundering activities of Frank Coyle.

An IRS undercover agent, Monaghan, contacted Coyle and met him on July 12, 1988. During a recorded conversation, Coyle identified defendant King as a friend who "could legitimize any kind of money" for a fee of 25%. When the undercover agent objected to the high fee, Coyle called defendant King and discussed lowering the fee. Later that same day, Coyle again met with the undercover officer and informed him in a recorded

conversation that defendant King was willing to launder his money for a 15% fee.

Coyle told the undercover officer that defendant King's plan to launder his drug money called for the officer to give the cash to two attorneys, Ralph Jones and Ferris Williams, who would convert the cash to checks. Pursuant to the plan, the undercover officer met with the attorneys on September 21, 1988, and gave the attorneys $50,000 cash for the purpose of laundering. The attorneys, however, had problems with laundering the cash, and it took them approximately six months and several bounced checks to accomplish the laundering of the cash previously received on September 21, 1988.

During the course of the delays and bounced checks, Coyle testified that defendant King discussed the problems and Coyle told King that he ought to find someone else. Sometime shortly before March 20, 1989, Coyle testified that defendant King called him and informed him that defendant Payne was willing to launder the

undercover officer's cash. On March 20, 1989, Coyle called the undercover officer and informed him that defendant King had found another person to launder his cash and a meeting between defendant King and the undercover agent was arranged for March 23, 1989.

On March 23, 1989, the undercover officer met Coyle and, for the first time, met defendant King. The meeting was recorded. The undercover officer made it absolutely clear, at the very beginning of the meeting, that his money came from the sale of cocaine. During the conversation with the undercover officer, defendant King indicated that he had arranged the original deal with the attorneys and described the attorneys' efforts to launder Monaghan's cash as a "disaster" and "embarrassing." Defendant King told Monaghan that a friend of his, defendant Payne, had agreed to launder the officer's cash for a 20% fee and that it would take defendant Payne only 10 to 14 days. Defendant King assured Monaghan that the previous problems of bounced checks

with the attorneys would not reoccur.

On March 31, 1989, undercover officer Monaghan met defendant Payne along with defendants King and Coyle. The meeting was recorded and played for the jury during the trial. Again, the undercover officer made it absolutely clear that his money came from the sale of cocaine. Defendant Payne informed the officer that defendant King had informed him of the prior problems and that he, Payne, assured the officer that the officer would have no problems with him and even stated that he would give the officer certified checks if the officer wanted them. Defendant Payne told the officer that he had several ways to launder the cash, but the best way was through a business that could be set up to accept large sums of cash. Defendant Payne stated that although he controlled the business, the business could not be traced to him. Defendant Payne further stated that the laundered cash would be returned to the officer in the form of a check and that the check would not be signed by Payne and could

not be traced to him. Defendant Payne gave the officer his business card with his and defendant King's home telephone numbers in order that the officer could contact them when he was ready to launder his cash.

On April 12, 1989, defendant King met with the undercover officer at a local hotel room and received $25,000 in cash to be laundered. Defendant King telephoned defendant Payne from the hotel room and after King left the meeting with the officer, defendant King drove immediately to the residence of defendant Payne.

On April 18, 1989, Coyle testified that defendant Payne gave him a $25,000 check made payable to the undercover officer's fictitious account, the Putnam Investment account. The check was drawn on a company called Investors Unlimited. Leonard Trem had opened the Investors Unlimited account on April 11, 1989, less than two weeks after defendants King and Payne had met with the undercover officer. The money deposited

into the account was the result of a series of bank checks, all less than $10,000. The bank checks, all from different banks located within a short distance of each other, were purchased with cash.

On July 24, 1990, defendants-appellants Val King and Hubert Payne along with co-defendants Frank Coyle, Ralph Jones, Leonard Trem,[1] and Ferris Williams were indicted by a federal grand jury on a six-count indictment. Coyle, Williams, and Jones pled guilty. During the trial of defendants Payne and King, those who had pled guilty, Coyle, Williams, and Jones, testified against defendants Payne and King on the government's behalf. At the trial, defendant King did not testify and did not present any evidence.

Defendant Payne testified that defendant King brought him into the money laundering enterprise. Defendant Payne conceded that he met with the undercover officer on March 31, 1989, that he knew that the undercover officer made his money from the sale

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1. Leonard Trem was tried and acquitted.

of cocaine, and that he discussed with the officer ways in which he could launder the officer's money. He contended, however, that he never meant to launder drug money. Defendant Payne testified that he withdrew from the conspiracy following the March 31, 1989 meeting. Defendant Payne, on cross-examination regarding the issue of withdrawal, admitted that he never contacted any law enforcement agency about the money laundering activities of Coyle, King, or the undercover officer and that all he told King was that the laundering of the undercover officer's money was crazy and not in their best interest. Defendant Payne did nothing to stop the money laundering activity.

Based on the foregoing evidence, on March 9, 1991, defendant King was found guilty of conspiracy to launder money and the substantive offense of money laundering and defendant Payne was found guilty of conspiracy to launder money. Payne was acquitted of the substantive offense of money laundering.

On June 21, 1991, King was sentenced to 50 months in

prison and a $25,000 fine. Payne received a sentence of 46 months and a $25,000 fine.

Defendants timely filed an appeal.

II.

We must first decide whether the government's investigation and undercover operation in regard to defendant King shocks a universal sense of justice and fundamental sense of fairness.

Defendant King argues that the government's sting operation was based on outrageous government conduct. This defense was first articulated in *United States v. Russell*, 411 U.S. 423 (1973), which states that if the government conduct in an undercover operation is so outrageous that it shocks the conscience, the government would be barred from obtaining a conviction. *Id.* at 431-32. However, this defense does not preclude the government from conducting undercover operations. As the Supreme Court stated in *Hampton v. United States*, 425

U.S. 484, 490 (1976), this defense only applies if the government activity in question violates some protected right of the defendant. In *United States v. Brown*, 635 F.2d 1207, 1212-14 (6th Cir. 1980), this court articulated four factors to consider regarding claims of outrageous government conduct. Defendant King contends that there is no need for undercover investigations of money laundering in which undercover agents pose as drug dealers who are trying to launder money, because there is a less intrusive means of investigating such activity. Defendant King argues that the government should instead monitor all financial currency transactions. This argument is ridiculous. The government has no such authority.

The second factor to consider is whether the criminal enterprise preexisted the undercover investigation. Defendant King argues that the government only had suspicions of defendant Coyle, the stockbroker, who had been implicated by the FBI informant. Defendant King argues that before the undercover sting

operation, the government had no suspicions that he was involved in money laundering. This argument is to no avail. Before the undercover officer ever met defendant King and discussed money laundering with him, the government had a "reasonable suspicion" that he was involved in money laundering because the undercover agent had witnessed a telephone call in which Coyle called defendant King and defendant King agreed to launder money for a certain fee. Just because King was unknown when the undercover operation commenced does not mean that his constitutional due process rights were violated or that the government's conduct in his regard was outrageous. Once an undercover operation has begun, new conspirators, who are at first unknown to the government, may be uncovered during the course of the investigation.[2]

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[2] **This case is distinguishable from *Jacobson v. United States*, No. 90-1124, U.S.L.W., Vol. 60, No. 39 (April 6, 1992) recently decided by the Supreme Court. Unlike *Jacobson*, the government in the present case did not make the initial contact with defendant King or put pressure on King to join the money laundering conspiracy. Defendant King was not the subject of the sting operation, but became a willing participant after only one telephone call from**

The third factor to consider is whether the government agent directed or controlled the enterprise. Defendant King claims that the government was excessively involved in the money laundering activity because one of its agents played the role of a drug dealer who had money and put pressure on other people to launder the money.

We do not agree that this involves excessive government activity. The role playing and provision of money in the present case merely gave the defendants the opportunity to commit the crime of money laundering. The defendants, on the other hand, supplied the fictitious account in which to deposit the laundered money and accepted the cash and converted it into checks without the filing of a currency transaction report, set up a fictitious business called Investors Unlimited, and then issued checks back

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defendant Coyle, providing evidence that King had engaged in prior conversations with Coyle about money laundering. In contrast, the defendant in *Jacobson*, who was the subject of the sting operation, was entrapped by the government after extensive inducements to engage in illegal activity without sufficient evidence that Jacobson was predisposed to violate the law.

to the fictitious account previously set up to accept the laundered cash. In undercover drug deals it is not considered excessive for the government to supply the funds to purchase the drugs or to provide the drugs themselves to be purchased by the defendant. *See Hampton v. United States*, 425 U.S. at 489-90. Similarly, in the present case we do not believe it was excessive merely to provide money to be laundered. It was the defendants who devised the manner in which the cash was to be structured to avoid detection.

The fourth factor to be considered is the impact of the law enforcement activity on the commission of the crime. Defendant King argues that the government's impact was too great because it continually put pressure on defendant Coyle to find other sources for money laundering. This argument is to no avail for two reasons. First, the Supreme Court has stated that the government's conduct must violate the defendant's rights, not a third-party's right. *Id.* at 490, 96 S. Ct. at 1650. There is no

evidence that the government coerced King. Second, defendant Coyle denied that any pressure was placed on him by the undercover officer to get other people involved in the money laundering. Moreover, the facts indicate that upon the first meeting between the undercover agent and Coyle, Coyle called King, who immediately agreed to launder the money for a fee.

Finally, defendant King's argument that the defense of outrageous government conduct is to be determined by the jury is contrary to what has been stated by the Fifth Circuit. In *United States v. Stanley*, 765 F.2d 1224, 1232 (5th Cir. 1985), the court stated that the defense of outrageous government conduct is an issue to be determined by the court and not a jury. Also, defendant King's argument that 18 U.S.C. §1956(a)(3) is unconstitutional because it has a provision for sting operations is without merit. No court has ever stated that, as a matter of law, it is impermissible for the government to engage in "undercover" or "sting" operations. Instead, each operation must be examined

based on the facts of each situation. In the present case, the facts, which consist of role playing and providing money, do not indicate that the government's conduct was outrageous. Therefore, the district court is affirmed on this issue.

III.

We must next decide whether the government violated *Batson v. Kentucky*, 476 U.S. 79 (1986) by excluding two black jurors who were active in civil rights causes.

Defendant King argues that the government peremptorily challenged two jurors because of their race and excluded them from the jury on the basis of race, violating *Batson v. Kentucky*.

The government argues that the reason it used two of its peremptory challenges in order to exclude black activist groups, NAACP and Black Caucus, was because defendant King was trying to inject the issue of race discrimination into his trial. Defendant King had sought to introduce evidence of a civil race discrimination suit which he had filed against a former employer.

The trial court reserved ruling on this motion until such time as the defendant sought to introduce this evidence. It was against this background that the prosecution sought to exclude the two jurors. The government argues that it was not because of their race but because of the advocacy groups to which they belonged that these two individuals were excluded.

This court reviews a district court's findings about the credibility of the prosecutor's asserted neutral explanations for peremptory challenges under a clearly erroneous standard. *United States v. Peete*, 919 F.2d 1168, 1179 (6th Cir. 1990). We do not find that the distinction the government drew between the race of the two individuals who were excused and the affiliations and activities of those two individuals to be clearly erroneous. Moreover, all black jurors were not excluded from the jury. In these circumstances, we do not believe that the prosecutor's explanation can be regarded as pretexual. Therefore, we affirm the district court's finding that the prosecutor offered a valid

neutral explanation for the exclusions.

IV.

Both defendants King and Payne argue that hearsay evidence was admitted in violation of Fed. Rule Evid., Rule 801(d)(2)(E), because it had not been shown by a preponderance of the evidence that a conspiracy existed, or that the defendant against whom the hearsay was offered was a member of the conspiracy.

Specifically, defendant King argues that there is insufficient evidence to indicate that he was a member of the first money laundering conspiracy which involved the laundering of the money through the attorneys Ralph Jones and Ferris Williams should not have been admitted against him because there is insufficient evidence to link him to those two people of the first money laundering transaction that occurred.

We disagree that there is insufficient evidence to link King to Jones and Williams or to indicate that they were all members of

the same conspiracy. First, Coyle testified that defendant King gave him Jones' and Williams' telephone numbers and stated that they were willing to "convert cash into checks for a fee." Second, there was a recorded telephone conversation of defendant King in which he apologizes for the disastrous and unprofessional conduct of Jones and Williams. Third, there is a recorded telephone conversation of defendant King, reaffirming King's knowledge of the problems incurred with Jones' and Williams' bounced checks. For all of these reasons, the district court properly admitted the statements of co-conspirators Jones and Williams against defendant King. It was established by a preponderance of the evidence that a conspiracy to launder money through attorneys Jones and Williams existed and that defendant King, against whom the hearsay testimony of Jones and Williams was offered, was a member of the conspiracy.

In regard to defendant Payne, he first argues that the statements which co-conspirator King made prior to March 20 and

March 23, 1989 were statements made before he entered into the conspiracy and were improperly admitted as co-conspirator statements against him.

We disagree. Defendant Payne's membership in the conspiracy is evident from Payne's own admissions made on March 31, 1989. In other words, the statements of defendant King, which Payne is contesting should not have been admitted into evidence, merely affirm what Payne himself later admitted on March 31, 1989. Although it is true that Payne did not meet and speak with the undercover agent until March 31, 1989, King's statements about Payne's prior activities were confirmed by the conversation which Payne had with the undercover agent on March 31, 1989. In this conversation, Payne indicated that King had told him about the problems the officer had had with the two attorneys during the previous money laundering transaction and Payne assured him that he would not have such problems with him. Thus, it is not just the hearsay testimony of defendant King that

links Payne to the conspiracy, but his own overt act. Defendant Payne's own statements establish, by a preponderance of the evidence, that he was a member of the conspiracy and that King's statements were in furtherance of the conspiracy. Therefore, they were properly admitted under Fed. Rule Evid., Rule 801(d)(2)(E).

The second argument defendant Payne makes in regard to co-conspirator statements is that there is no evidence that he was a member of the first transaction of the money laundering conspiracy which consisted of the money the undercover agent gave to attorneys Jones and Williams on September 21, 1988, which they then converted into cash.

Even if it is conceded that Payne was not a member of the conspiracy involving the $50,000 cash given to attorneys Jones and Williams, the admission of the testimony of Jones and Williams was not prejudicial to Payne. The trial court, at defendant Payne's request, fully instructed the jury as to the law of multiple conspiracies. Specifically, the trial Court instructed the jury that

if they found Payne was not a member of the conspiracy involving the first transaction with Jones and Williams, then the jury was not to consider the evidence regarding the actions of Coyle, Jones, and Williams in this regard in deciding the guilt of defendant Payne. Moreover, the Supreme Court has recently held that the insufficiency of the evidence as to one of multiple objectives of a conspiracy charged in a single count does not require setting aside a general verdict of guilty on the charge. *Griffin v. United States*, 112 S. Ct. 466 (1991). Therefore, even if there were insufficient evidence to tie Payne to the laundering of the $50,000 provided on September 21, 1988, there was sufficient evidence to tie him to the laundering of the $25,000 provided on April 12, 1989.

V.

Defendant Payne also argues that the trial court improperly placed the burden of proof regarding Payne's alleged withdrawal from the conspiracy on him and that the burden of proof should have been placed on the government. Defendant Payne essentially

is asking this court to reverse the precedent of this circuit in regard to this issue. This court places the burden of proof of withdrawal from a conspiracy on the defendant as stated in *United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir.), *cert. denied*, 112 S. Ct. 397 (1991). We see no reason for requesting an en banc panel of this court to reconsider this opinion, as defendant wishes, because it is consistent with the opinions of other circuits. *See, e.g. United States v. Cardall,* 885 F.2d 656. 668 n.22 (10th Cir. 1989); *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986); *United States v. Boys,* 610 F.2d 521, 528 (8th Cir. 1979), *cert. denied,* 444 U.S. 1089 (1980). Moreover, the Sixth Circuit's position of placing the burden of proof for affirmative defenses on the defendant is consistent with the Supreme Court decision in *Martin v. Ohio,* 480 U.S. 228 (1987). For these reasons, the district court is affirmed on this issue.

VI.

Both defendants challenge their convictions based on

insufficiency of the evidence. In essence, both defendants are arguing that more credence should be placed on their testimony than the testimony of defendant Coyle, who was cooperating with the government and who was motivated to help try to convict them. Defendant King argues that it is only Coyle's testimony that connects him to the money that was laundered in the second transaction. What both defendants fail to realize is that under the standard for the sufficiency of the evidence, the appellate court is to construe all facts in favor of the government. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

It is clear that under this standard, there is sufficient evidence to convict each defendant. Even though defendant Coyle was testifying for the government, the jury had the right to credit his testimony over that of the defenses asserted by defendants King and Payne. In other words, the jury evidently believed defendant Coyle rather than defendant King, whose attorney argued that there was no evidence that King did anything with the $25,000 that the

undercover agent had given to him on April 12, 1989,[3] or was involved with the $50,000 given to the two attorneys. The jury also credited the testimony of defendant Coyle over that of defendant Payne that Payne did not withdraw from the conspiracy as he alleged. Under the standard of construing all the evidence in favor of the government, these facts as provided by Coyle must be taken as true as the jury accorded them credibility. In regard to defendant Payne, acquittal of the substantive offense does not constitute a determination that no overt act was committed, nor preclude a conviction on the conspiracy account. *Boyd*, 610 F.2d at 528. Therefore, there is sufficient evidence to convict both

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[3] Defendant King argues that the specific currency that he received from the undercover agent on April 12, 1989 cannot be traced and its location remains unknown. This does not mean, however, that there is insufficient evi-dence to indicate that after giving King $25,000 in cash, the undercover agent received back a laundered check for $25,000 made payable to his account in a fictitious name at Putnam Investment. Defendant King's argument that defendant Coyle, who had never been given any money by the undercover agent, was alone responsible for the laundered money is ridiculous. If defendant King just "sat on" the $25,000 as he alleges, why didn't he return the money to Monaghan. King's argument that the government's version of events is contrary to the evidence is without merit.

defendants King and Payne for conspiracy and sufficient evidence to convict King on the substantive count of money laundering.

VII.

Defendant King argues that he should not have been given an enhancement under United States Sentencing Guideline § 2S1.1 because he believed the funds were the proceeds of an unlawful activity. Defendant King argues that he was convicted in a "sting" operation and the money was not actually drug money. Therefore, he contends that the money is not the "proceeds of an unlawful activity" as defined in the Guideline.

The plain meaning of Guideline § 2S1.1 states that the enhancement applies if the defendant "knew or believed that the funds were in proceeds of an unlawful activity." The Guideline indicates that as long as the defendant believes that the funds were the proceeds of an unlawful activity, the Guideline applies. The district court is affirmed on this issue.

VIII.

Finally, we must decide whether defendant Payne should receive the benefits of an acceptance of responsibility guideline because he decided to testify in his behalf at trial and stated that he withdrew from the conspiracy. We review a district court's determination of acceptance of responsibility under a clearly erroneous standard. *United States v. Williams*, 940 F.2d 176, 182 (6th Cir.), *cert. denied*, 112 S. Ct. 66 (1991). The district court made a finding that defendant Payne had not withdrawn from the conspiracy as he testified. Because it found that Payne had testified untruthfully, the court was warranted in refusing to give him the acceptance of responsibility benefit of Guideline § 3E1.1. It cannot be said that this finding was clearly erroneous. Therefore, the district court is affirmed on this issue.

For the same reason, the district court is affirmed on its finding that defendant Payne did not have a minimal role in the offense. Even though defendant Payne was acquitted of the money laundering charge in the indictment, he was convicted for

conspiracy to launder money. Therefore, the district court could properly find that he did not have a minimal role in the conspiracy even though he was not convicted for laundering money. This finding was not clearly erroneous, because defendant Payne was recorded talking to undercover agent Monaghan, telling Monaghan that he could set up a transaction which would launder his money for a 20% fee very quickly and that he would set up a fictitious business to do so, and this role was not a minimal role in this offense. For these reasons, the district court is affirmed on these issues.

IX.

To conclude, the district court is hereby AFFIRMED.

NO._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HUBERT PAYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1992

HUBERT PAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly applied Rule 801(d)(2)(E), Fed. R. Evid., to admit statements made by petitioner's co-conspirators during and in furtherance of the conspiracy.

2. Whether the district court properly placed on petitioner the burden of proving that he withdrew from the conspiracy.

3. Whether the district court committed clear error in ruling at sentencing that petitioner had not accepted responsibility for and did not have a minimal role in the offense.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A26-A52) is reported at 962 F.2d 1228.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1992. A petition for rehearing was denied on June 22, 1992 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on September 21, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of conspiring to launder drug proceeds

(18 U.S.C. 1956) and to avoid currency reporting requirements (31 U.S.C. 5324), in violation of 18 U.S.C. 371. The district court sentenced petitioner to 46 months' imprisonment, to be followed by two years' supervised release, and fined petitioner $25,000. The court of appeals affirmed. Pet. App. A26-A52.

1. The evidence at trial showed that petitioner agreed to launder drug proceeds. The investigation leading to petitioner's arrest and conviction began in 1988 when the Internal Revenue Service (IRS) received information that Frank Coyle, a Cleveland stockbroker, and John McCurley, a drug dealer, were engaged in money laundering. The IRS commenced an undercover investigation that also implicated Val King, who offered to convert cash into checks through two attorneys. An undercover IRS agent gave the two attorneys $50,000 in putative drug proceeds, but the attorneys encountered difficulty in laundering the money. Pet. App. A27-A28.

Frank Coyle testified at trial that sometime shortly before March 20, 1989, he and King discussed the problems they had encountered in laundering the cash. On March 23, 1989, in a meeting that the IRS secretly recorded, King and Coyle acknowledged to the undercover IRS agent that the attorneys' efforts to launder the drug proceeds had been a "disaster" and "embarrassing," but King assured the agent that he had a friend—petitioner—who could launder cash successfully in 10 to 14 days. Pet. App. A29-A30.

On March 31, 1989, in another secretly recorded meeting, the undercover IRS agent met with Coyle, King, and petitioner. The agent made clear that he wished to launder drug proceeds, and petitioner

assured the agent that he could successfully launder the cash by passing the money through a business established for that purpose. At the close of the meeting, petitioner gave the agent a business card bearing his and King's home phone numbers. Pet. App. A30-A31.

On April 12, 1989, the undercover agent met King in a hotel room and gave him $25,000 to launder. King called petitioner from the hotel room and drove immediately from the meeting to petitioner's residence. On April 18, 1989, petitioner gave Coyle a $25,000 check drawn on the account of a company called Investors Unlimited and made payable to the undercover agent's fictitious company. The Investors Unlimited account had been opened on April 11, 1989, and the money deposited into it had come from a series of local bank checks purchased with cash in amounts of less than $10,000. Pet. App. A31-A32.

Petitioner testified in his own defense. He acknowledged meeting with the undercover IRS agent on March 31, 1989, to discuss laundering drug proceeds. According to petitioner, however, he never intended to launder the money. Petitioner claimed that he withdrew from any conspiracy following the meeting, when he informed King that laundering the money was crazy and not in their best interest. Petitioner conceded, however, that he did not contact the authorities or do anything to stop the money laundering activity. Pet. App. A32-A33.

2. The district court instructed the jury that to convict petitioner of conspiracy the government must prove three elements beyond a reasonable doubt:

> First, that two or more persons conspired, or agreed, to commit the crime of laundering money instruments or structuring transactions to evade the bank reporting requirements. Second, that [petitioner] knowingly and voluntarily joined the conspiracy. And third, that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

C.A. App. 966. After detailing the government's burden of proof with respect to those three elements, the court instructed the jury that petitioner had "raised the defense that he withdrew from the agreement before any overt act was committed." *Id.* at 975.

The court explained that "[w]ithdrawal can be a defense to a conspiracy charge," but petitioner "has the burden of proving to you that he did in fact withdraw." C.A. App. 975. Moreover, the court instructed that the withdrawal must have occurred "before any member of the group committed one of the overt acts described in the indictment." *Id.* at 976. The court reminded the jury that "[t]he fact that [petitioner] has raised this defense does not relieve the Government of its burden of proving that there was an agreement, that [petitioner] knowingly and voluntarily joined it, and that an overt act was committed." *Ibid.*

After the jury convicted petitioner of conspiracy, the district court sentenced him under the Sentencing Guidelines to a 46-month prison term. In setting petitioner's Guidelines sentencing range, the

court made two determinations that petitioner challenged on appeal. First, the court denied petitioner credit for acceptance of responsibility (Guidelines § 3E1.1), finding that he had testified untruthfully regarding the crime for which he was convicted, and therefore had not accepted responsibility for it. See Pet. App. A51. Second, the court denied petitioner a reduction for having a minimal role in the offense (Guidelines § 3B1.1). See Pet. App. A51-A52.

3. The court of appeals affirmed petitioner's conspiracy conviction and sentence. Pet. App. A26-A52. Of particular relevance here, the court of appeals held that the district court: (a) properly admitted statements made by petitioner's co-conspirators, *id.* at A43-A46; (b) properly instructed the jury that petitioner had the burden of proving he withdrew from the conspiracy, *id.* at A46-A47; and (c) did not commit clear error in making its sentencing determinations, *id.* at A50-A52.

ARGUMENT

1. Petitioner presents a series of arguments (Pet. 27-40) challenging the district court's admission of statements made by petitioner's co-conspirators during and in furtherance of the conspiracy. Those arguments are without merit. Co-conspirator statements are admissible under Rule 801(d)(2)(E), Fed. R. Evid., if the district court finds by a preponderance of the evidence that a conspiracy existed and that the defendant participated in it. See *Bourjaily* v. *United States*, 483 U.S. 171, 181 (1987). Ample evidence existed in this case to support the admission of co-conspirator statements against petitioner. Admitting such statements did not violate petitioner's rights

under the Sixth Amendment's Confrontation Clause. See *Bourjaily*, 483 U.S. at 181-184 (following *United States* v. *Inadi*, 475 U.S. 387 (1986)).

Specifically, the court properly admitted statements made by co-conspirator King to co-conspirator Coyle and the undercover IRS agent concerning petitioner's involvement in the conspiracy prior to the March 31, 1989, meeting. Those statements closely parallel the co-conspirator statements that this Court's *Bourjaily* decision had declared admissible. In *Bourjaily*, co-conspirator Lonardo stated that he was involved in drug dealing with a "friend" and "[t]he friend, who turned out to be petitioner, showed up at the prearranged spot at the prearranged time." 483 U.S. at 180-181. This Court held that "[t]he courts below properly considered the statements of Lonardo and the subsequent events in finding that the Government had established by a preponderance of the evidence that Lonardo was involved in a conspiracy with petitioner." *Id.* at 181. Similarly, King's statements to Coyle and the undercover IRS agent concerning petitioner's membership in the conspiracy were confirmed by petitioner's "own admissions made on March 31, 1989" when he participated in the meeting that King had arranged. Pet. App. A44.

The court also properly admitted co-conspirator statements regarding the laundering of the undercover IRS agent's original $50,000. Notwithstanding petitioner's claim that he was not involved in that original transaction, the prior co-conspirator statements were admissible against him because he

subsequently joined the money laundering conspiracy. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 393 (1948) ("With the conspiracy thus fully established, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy."). See generally 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(2)(E), at 801-337 (1992) ("a statement of a co-conspirator is admissible against all other conspirators, including those who joined after the statement was made") (citing cases). Petitioner's contention that the original $50,000 was laundered pursuant to a separate conspiracy is inconsistent with the proof at trial. As the indictment charged, the attempts to launder the $50,000 and the $25,000 were part of a single conspiracy involving the continuing participation of conspirators King and Coyle.[1]

2. Petitioner also challenges (Pet. 40-56) the district court's instructions to the jury that petitioner bore the burden of proving he withdrew from the conspiracy. The courts below correctly recog-

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[1] The issue whether the proof establishes a single conspiracy or multiple conspiracies requires a "factual determination." *United States* v. *Broce*, 488 U.S. 563, 569 (1989). The court of appeals correctly found that petitioner's rights were fully protected by instructions that the jury should not consider co-conspirator statements with respect to petitioner if the jury found they related to a separate conspiracy. Pet. App. 45-46; cf. *Yates* v. *Evatt*, 111 S. Ct. 1884, 1893 (1991) (describing the "sound presumption of appellate practice" that "jurors are reasonable and generally follow the instructions they are given").

nized that, while the government has the burden of proving beyond reasonable doubt every element of the conspiracy offense, a defendant seeking to avoid criminal liability has the burden of proving the affirmative defense that he withdrew from the conspiracy.

A withdrawal defense requires not only that a defendant have ceased participating in the conspiracy, but also that he either have disclosed the conspiracy to the authorities or at least have done some "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978). Even if the defense is established, it does not excuse the defendant from criminal responsibility for his prior conspiratorial acts, but instead simply serves as a foundation for other defenses, such as a statute of limitations claim. See, *e.g.*, *United States Gypsum Co.*, 438 U.S. at 465 n.38.[2]

This Court has long held that a defendant who claims that he withdrew from the conspiracy must show some "affirmative action" constituting withdrawal. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912). In *Hyde*, the Court ruled that a defendant's

[2] See also *United States* v. *Read*, 658 F.2d 1225, 1232-1233 (7th Cir. 1981) (withdrawing "defendant is still liable" for prior conspiratorial acts and withdrawal "becomes a complete defense only when coupled with the defense of the statute of limitations"); cf. Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 957 (1959) ("in those jurisdictions which have overt-act requirements, the defendant is not punishable as a member of the conspiracy if he withdraws before an overt act is committed").

participation in a conspiracy continues whether or not he performs acts in furtherance of the conspiracy and that "until he does some act to disavow or defeat the purpose he is in no situation" to assert a withdrawal defense. *Ibid.* In accordance with *Hyde*, the overwhelming majority of federal courts of appeals have held that a defendant bears the burden of proving his withdrawal from a conspiracy.[3]

The Seventh Circuit departed from that line of authority in *United States* v. *Read*, 658 F.2d 1225 (1981). That court construed *Hyde* as deciding only who bears the burden of production rather than the burden of proof, and it declined to follow prior Seventh Circuit cases placing on defendants the burden of proving withdrawal. 658 F.2d at 1234-1236. See, *e.g.*, *United States* v. *Dorn*, 561 F.2d 1252, 1256 (7th Cir. 1977). The court reasoned that the Due Process Clause requires the government to "disprove the defense of withdrawal beyond a reasonable doubt," because with-drawal "directly negates the element of membership in the conspiracy during the period of the statute of limitations." 658 F.2d at 1233. The court

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[3] See, *e.g.*, *United States* v. *Dyer*, 821 F.2d 35, 39 & n.6 (1st Cir. 1987); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), cert. denied, 379 U.S. 960 (1965); *United States* v. *Gillen*, 599 F.2d 541, 548 (3d Cir.), cert. denied, 444 U.S. 866 (1979); *United States* v. *Branch*, 850 F.2d 1080, 1082-1083 (5th Cir. 1988), cert. denied, 488 U.S. 1018 (1989); *United States* v. *Lash*, 937 F.2d 1077, 1083 (6th Cir.), cert. denied, 112 S. Ct. 397 (1991); *United States* v. *Granados*, 962 F.2d 767, 773 (8th Cir. 1992); *United States* v. *Russell*, 963 F.2d 1320, 1323 (10th Cir.), cert. denied, 113 S. Ct. 280 (1992); *United States* v. *Finestone*, 816 F.2d 583, 589 (11th Cir.), cert. denied, 484 U.S. 948 (1987).

left intact, however, the rule that "the burden of going forward with evidence of withdrawal * * * remains on the defendant." *Id.* at 1236.[4]

Since the Seventh Circuit's decision in *Read*, this Court has decided cases undermining *Read*'s suggestion that the Due Process Clause forbids placing the burden of proving withdrawal on a defendant. For example, in *Martin* v. *Ohio*, 480 U.S. 228 (1987), this

[4] Petitioner also cites First and Third Circuit opinions purportedly supporting his position. But while the First Circuit in *United States* v. *Piva*, 870 F.2d 753, 756-757 (1st Cir. 1989), cert. denied, 494 U.S. 1016 (1990), quoted a district court jury instruction placing the burden on the government to negate withdrawal, the cor-rectness of that instruction was not at issue and not challenged by the government on appeal. The First Circuit's position is thus more accurately determined from *United States* v. *Dyer*, *supra*, in which the court upheld a challenged instruction that the government bears the burden of proving the essential elements of conspiracy, but that "if the defendant contends he withdrew or was abandoned from the conspiracy, the burden shifts to the defendant to demonstrate that" defense. 821 F.2d at 39 & n.6. Similarly, the Third Circuit has not abandoned its holdings that "the burden of establishing withdrawal lies on the defendant." *United States* v. *Heckman*, 479 F.2d 726, 729 (3d Cir. 1973) (quoting *Borelli*, 336 F.2d at 388). See *Gillen*, 599 F.2d at 548. The cases cited by petitioner recognize that a defendant presenting prima facie evidence of withdrawal is entitled to acquittal if that evidence is uncontradicted. See, *e.g.*, *United States* v. *Jannotti*, 729 F.2d 213, 221 (3d Cir.), cert. denied, 469 U.S. 880 (1984); *United States* v. *Steele*, 685 F.2d 793, 803-804 (3d Cir.), cert. denied, 459 U.S. 908 (1982). The Ninth Circuit recently cited *Read* approvingly in a mail and wire fraud case, but the case did not involve a conspiracy charge and the statements are accordingly dicta as to the issue presented here. *United States* v. *Lothian*, No. 90-50269 (9th Cir. Oct. 5, 1992), slip op. 11960.

Court held that a State does not violate due process by requiring a murder defendant to bear the burden of proving self-defense. And in *Medina* v. *California*, 112 S. Ct. 2572 (1992), the Court ruled that a State may constitutionally require the defendant to bear the burden of proving incompetence. As with those other defenses, requiring a defendant to establish withdrawal does not "offend[] [any] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 2577 (internal quotation marks omitted).[5]

Not only have decisions of this Court undermined *Read*'s rationale, but the Seventh Circuit itself has called that decision into question. The Seventh Circuit stated in a case decided after *Read* that "the burden of [establishing] withdrawal lies on the defendant." *United States* v. *Patel*, 879 F.2d 292, 294 (7th Cir. 1989) (Posner, J.) (quoting Judge Friendly's opinion in *Borelli*, 336 F.2d at 388). But see *United States* v. *Rossy*, 953 F.2d 321, 325 (7th Cir.) (following *Read*), cert. denied, 112 S. Ct. 1240 (1992). Given the continuing intra-circuit conflict on that issue, the

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[5] Under the common law, petitioner would not have been able to raise his withdrawal defense at all, because the crime of conspiracy was complete without proof of an overt act. See *Hyde* v. *United States*, 225 U.S. at 359; see generally R. Perkins & R. Boyce, *Criminal Law* 685 (1982) ("At common law guilt of conspiracy was incurred by the combination for a forbidden purpose, and no additional 'overt act' was required for conviction — which is still the law where unchanged by statute.") (footnotes omitted). Indeed, unlike 18 U.S.C. 371, which expressly requires an overt act, other federal statutes punish simply the illicit agreement itself. See, *e.g.*, 21 U.S.C. 846, 963 (drug conspiracy statutes); 15 U.S.C. 1 (Sherman Act).

Seventh Circuit may be persuaded to reconsider the issue en banc. If the Seventh Circuit follows the decisions of the other circuits, it would eliminate any need for review by this Court.

Even if this Court concludes that the Seventh Circuit is committed to its position in *Read* and that the circuit conflict is likely to persist, this case is not an appropriate vehicle for resolving the conflict. Petitioner asserts that he withdrew from the conspiracy immediately after the March 31, 1989, meeting. That purported withdrawal, however, came too late to absolve him of guilt. At the time of that meeting, petitioners' co-conspirators had already reached an agreement to launder drug proceeds, and they had committed numerous overt acts in furtherance of the conspiracy. Once petitioner joined the conspiracy, he became criminally liable on the conspiracy charge—even if he subsequently withdrew from the plan. Petitioner's "purported withdrawal after overt acts had been performed came too late to provide a defense to a charge of conspiracy." *United States* v. *Loya*, 807 F.2d 1483, 1493 (9th Cir. 1987).[6]

Furthermore, shifting the burden of proof would not alter the result in this case, because petitioner's

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[6] See, *e.g.*, *Read*, 658 F.2d at 1230 ("Each conspirator is liable for overt acts of every other conspirator done in furtherance of the conspiracy, whether the acts occurred before or after he joined the conspiracy."). See also Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 946 (1959) (defendants joining conspiracy are liable for prior overt acts). Indeed, at the meeting itself, petitioner personally committed an overt act in furtherance of the conspiracy when he gave the IRS agent a business card bearing his and King's home phone numbers. See Pet. App. A30-A31.

evidence of withdrawal was so insubstantial that any error in assigning the burden of proof would have been harmless. Petitioner's only evidence of withdrawal was his own uncorroborated testimony that he told King after the March 31, 1989, meeting that laundering the IRS agent's money was crazy and not in their best interest. Pet. App. A33. Some two weeks later, however, when King received $25,000 from the IRS agent, King immediately telephoned petitioner and went to petitioner's residence with the money. *Id.* at A31. Indeed, on appeal, petitioner characterized his defense as being that he never joined the conspiracy—a theory that the jury rejected. See Pet. C.A. Reply Br. 11.[7]

3. Finally, the court of appeals correctly held that the district court committed no clear error in sentencing when it denied petitioner a credit for

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[7] The relevant passage from petitioner's reply brief explained his trial defense as follows: "[Petitioner] never testified [that] he withdrew from any conspiracy. What his evidence showed was that no conspiracy including him was ever formed." C.A. Reply Br. 11. Petitioner went on to explain that, "to the extent it can be said that an agreement was reached on March 31, 1989," petitioner withdrew before any subsequent overt acts. *Ibid.* See also Pet. 18 (petitioner was simply "acting out a scenario" rather than actually joining the conspiracy at the March 31, 1989 meeting). Under the trial court's instructions, the government was required to prove beyond a reasonable doubt that petitioner "knowingly and voluntarily joined the conspiracy." See C.A. App. 966. Thus, the jury rejected petitioner's primary defense that he had not joined the scheme. See also *id.* at 969 ("proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it").

acceptance of responsibility (Guidelines § 3E1.1) and a reduction for having a minimal role in the offense (Guidelines § 3B1.1). Pet. App. A51-A52. The government submitted ample evidence rebutting petitioner's claimed withdrawal and demonstrating instead that he was a central figure in the conspiracy. There is no merit to petitioner's suggestion that his acquittal on the substantive money laundering offense represents a jury finding that he did in fact withdraw from the conspiracy. See *United States* v. *Watford*, 894 F.2d 665, 670-671 (4th Cir. 1990) (even though jury acquitted defendant of later substantive offense, district court properly found for sentencing purposes that defendant did not withdraw from conspiracy). Instead, the jury verdicts may simply have been the result of lenity or compromise. See *United States* v. *Powell*, 469 U.S. 57, 65 (1984). Given the overwhelming evidence demonstrating that petitioner's role in the conspiracy was far greater than he claimed, the district court properly denied him credit for acceptance of responsibility and a reduction for having a minimal role in the offense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(4)

NO. 92-517

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HUBERT PAYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Counsel opposite's asserted factual recitations, in addition to painting a distorted picture of the critical issue raised by this Petitioner are also inconsistent and contradictory in several critical respects. For example, we concede that "on March 23, 1989" Val

King (who had referred to Petitioner as a friend who would do anything for him **[Vol. II, p. 511]**), is credited with assuring the undercover "agent that he had a friend (Petitioner) who could launder cash successfully in 10 to 14 days" (**Brief For The United States In Opposition, p. 2**). It is also inconfutable, contrary to the implication in the government's position, that the only agreement reached that day, according to agent Monaghan, was that they would, in the future, meet and King would bring Payne to the meeting (**Tr., Vol. I, p. 144**). (Also see **Petition for Writ, p. 24, n. 2.**) The Record of Monaghan's testimony shows that he fully understood considerable discussions had to take place before there could be any agreement. (See **Tr., Vol. I, pp. 306-307.**)

The critical point here is well made when one credits the fact that on several occasions during this conversation, Monaghan (the agent) made the statement that "we are just talking or bullshitting". (**Tr., Vol. I, p. 308.**) Monaghan stated he flavored his conversations with these ingredients because he was "asking

possible scenarios as to how money could be moved..." (ibid). Payne testified he took this tenor of the conversation to mean no commitments were being made at that time (**Tr., Vol. II, p. 900-901**). (Also see **Petition For Writ, pp. 18-19**.)

This compelling interpretation of agent Monaghan's testimony is further buttressed by the categorical statement that he understood some further discussions between petitioner and King were going to take place and that any firm agreement between the parties would have to take place in the future (**Tr., Vol. I, p. 319**).

With the above showings as givens, the fact that petitioner in testifying "in his own defense ... acknowledged meeting with the undercover IRS agent on March 31, 1989" (**Brief For The United States In Opposition, p. 3**), hardly justifies the further statement that the purpose of the meeting was "to discuss laundering drug proceeds" (**ibid**). Indeed, there is no evidence whatsoever that supports any conclusion that petitioner was even

aware drug money was to be discussed at the meeting.

Also, it is a gross distortion of the Record of testimony before this Court to even suggest that petitioner ever "claimed he withdrew from any conspiracy following the meeting" on March 31, 1989. Proof this is a brazen distortion is fully established from a mere perusal of page 11, footnote 7 of the Government's Brief. There the government fully recognizes and credits the fact to be, as was the case, that Payne was contending he withdrew before any conspiracy that included him was ever formed. Here, it should be emphasized that this very point was called to the Appellate Court's attention in the Petition filed therein for Rehearing. There it was specifically stated that:

> ... Payne never testified he withdrew from any conspiracy. What his evidence showed was that no conspiracy including him was ever formed. And, that to the extent it can be said an agreement was reached on March 31, 1989, he withdrew from being a party to any such agreement before the April 4, 1989 Overt Act that would have

reopened any possible agreement into a conspiracy was committed.

Petition For Rehearing En Banc (filed in The Sixth Circuit Court of Appeals) at p. 5. (Also see, **Brief For The United States In Opposition, p. 13, n. 7.**)

RESPONSE TO GOVERNMENT'S ARGUMENT NO. 1

With specific reference to point 1 of the **Brief For The United States In Opposition** (pages 5-7), it could not be clearer why the government would have this Court consider the Rule 801(d)(2)(E) and confrontation issues on the basis of general principles and regard their requirements as having been satisfied simply because the government said so.

Now we do recognize this Court did conclude, in **Bourjaily v. United States, 483 U.S. 171 (1987)**, that "Lonardo's" reference to a friend who he said would be at a certain location, when his transaction with the government's informer went down, coupled with the friend's appearance at the time and involvement in the transaction that took place was enough to validate, under favor of

Rule 801(d)(2)(E), the admission of prior references to this friend. But this holding cannot be said to validify the government's position here that "King's statements to Coyle and the undercover IRS agent concerning petitioner's [possible] membership in the conspiracy were confirmed by petitioner's own admission made on March 31, 1989 when he participated in the meeting that King had arranged...." **(Brief For The United States In Opposition, p. 6.)**

So postured, the government's further contention that the considerable testimony, of the same type, "regarding the laundering of the undercover IRS agent's original $50,000" **(ibid)**, is likewise flawed. Indeed, in making its argument on this point the government again resorts to an outright distortion of the evidence. This it does when making the argument that these "prior co-conspirator statements were admissible against ... [petitioner] because he subsequently joined the money laundering conspiracy" **(Brief For The United States In Opposition, pp. 6-7)**.

The point of critical significance here is that even the

undercover IRS agent, in this case, testified that any deal contemplated with Payne was to be regarded as being independent from his prior deal with the lawyers (who had been involved with the other monies) with whom he repeatedly stated he did not want to have any further dealings with. **(Tr., Vol. I, pp. 305-307.)**

Even this is not all. The fact that the government argued to the jury that the conspiracy charged in this indictment came into being on March 31, 1989, in the wake of the meeting itself on that date, if nothing else, is inconsistent with the argument that this was the same conspiracy that included the lawyers.

RESPONSE TO GOVERNMENT'S ARGUMENT NO. 2

Having obviously reached the decision that this Court can be subliminally influenced by the way the government's arguments are structured, it is not surprising that we are told (in the government's argument no. 2) that: "[a] withdrawal defense requires not only that a defendant have ceased participating in the conspiracy, ..." and that this "Court has long held that a

defendant who claims that he withdrew from the conspiracy must show some 'affirmative action' constituting withdrawal." **(Brief For The United States In Opposition, p. 8.)**

Of course, the validity of the above tenets when viewed in isolation cannot be disputed. But they are really inapt here. This follows because, as argued by the government, if Payne withdrew from a conspiracy, the fact that the burden of proof on the issue of withdrawal was placed on him would be harmless **(id., pp. 12-13)**.

On this narrow point it should suffice here to note that what petitioner is precisely contending is well expressed in the Eleventh Circuit's Pattern Instruction, No. 518. There it is stated:

> If a Defendant enters into a conspiracy agreement but later changes his mind and withdraws from that agreement before anyone has committed an "overt act," as previously defined, then the crime was not complete at that time and the Defendant who withdrew cannot be convicted -- he would be not guilty of the alleged conspiracy offense.

(Emphasis supplied.) See the Ninth Circuit's Pattern Instruction, No. 8.05D. Also see **United States v. Heathington, 545 F.2d 972 (5th Cir. 1977)**.

Clearly then, if we credit the thrust one gets from the Eleventh and Ninth Circuit's Pattern Instructions, referred to above, one can see the why for the following additional quote from the **Government's Brief**. Here we are being told:

> Even if the defense [of withdrawal] is established, it does not excuse the defendant from criminal responsibility for his prior conspiratorial acts, but instead simply serves as a foundation for other defenses, such as a statute of limitations claim.

Brief For The United States In Opposition, p. 8.

The government's failure to reckon with the fact that petitioner is not claiming that he withdrew from any conspiracy, but is contending he withdrew before any conspiracy including him was ever formed, is really significant here. In our judgment it evidences an obvious hope the Court will simply look past the

presence of this flaw (and others) in the government's ratiocinations and look past the presence of these serious conflicts in the Circuits on the basic withdrawal issue.

So postured, the Court should really note with interest that the government's efforts to get away from the positions taken by the Seventh Circuit in **United States v. Read, 658 F.2d 1225 (7th Cir. 1981)**, and more recently in **United States v. Rossy, 953 F.2d 321, 325 (7th Cir.), cert. denied 112 S.Ct. 1240 (1992)** and the other cases relied on to support our thesis.[1] In the effort to do so counsel-opposite could only come up with what must be called a pathetic response. The reference here is to the really hollow argument that:

> Given the continuing intra-circuit conflict on ... [withdrawal] issue, the Seventh Circuit may [eventually] be persuaded to reconsider the issue en banc. If the Seventh Circuit follows

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[1] Not cited by the government as also providing support for our thesis is the Fifth Circuit case of **United States v. Heathington, 545 F.2d 972 (5th Cir. 1977)**.

> the decisions of ... [some] of the other circuits, it would eliminate any need for review by this Court.

Brief For The United States In Opposition, pp. 11-12.

Having made the above statement, and apparently realizing its shallowness, the government again returns to its favorite theory, i.e., that even if the jury had been properly instructed the result would have been the same. This we are told is so because "[a]t the time of ... [the March 31, 1992] meeting, petitioner['s] co-conspirators had already reached an agreement to launder drug proceeds, and they had committed numerous overt acts in furtherance of the conspiracy" (**Brief For The United States In Opposition, p. 12**).

The problem with understanding the government's thesis in this regard is that it ignores the fact that at the trial the government made the argument that on March 23rd, their undercover agent had met with Frank Coyle and Val King and during this meeting it was represented that Payne (who was not present) "was interested in

laundering money". And, the government contended that "the first overt act [which made for the conspiracy] was that a decision was made to meet with Hubert Payne" (**Closing Argument, Tr., Vol. II, pp. 1046-1048**). (Also see **Petition For Writ Of Certiorari, pp. 23-24**.) Distilled, the government's trial theory then was that at the March 23rd meeting the agreement element required for the conspiracy conviction was satisfied by the things Val King said about Payne (ibid) and that Payne's presence at the March 31st meeting resulted in the formulation of the charged conspiracy.

So postured, telling this Court petitioner's claimed "withdrawal after overt acts had been performed" comes too late (**id., p. 12**), without telling us what acts are being referred to and without indicating where they were specifically charged in the indictment hardly satisfies the requirements of due process here.

RESPONSE TO GOVERNMENT'S ARGUMENT NO. 3

This brings us to the government's argument no. 3, pages 13-14. The fact that the argument itself simply credits the fact of

Payne's acquittal for the substantive money laundering offense as being a non-factor in the asserted conclusion that the evidence here demonstrates Payne "was a central figure in the conspiracy" (**id., p. 14**), really says a lot. Not only does this contention lack substance, it ignores a basic reality. Simply stated it is hard to understand how Payne can be regarded as "a central figure in a conspiracy" to launder money in the wake of the fact that the co-defendant was in fact convicted of the substantive offense charged in the indictment and Payne was acquitted of that offense.

Also, the denial of the acceptance of responsibility credit (**Guidelines, §3E1.1**) cannot be defended on the theory that it was here -- that is, because Payne testified his conduct did not qualify him for conviction; inasmuch as, the evidence in his view was insufficient to make him a conspirator.

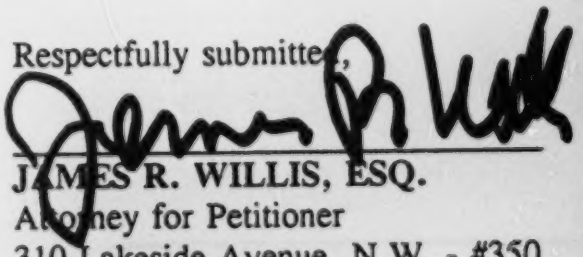
CONCLUSION

The most puzzling aspect of the government's various arguments, particularly with reference to the withdrawal issue, is

that it really defies logical analysis. Indeed, only the government would dare make the argument, made herein, that the conflict between the Circuits on a very specific issue should be left unresolved because the Seventh Circuit, which provides the chief support for petitioner's thesis, may eventually "reconsider the issue en banc ... [and] eliminate any need for review by this Court" **(Brief For The United States In Opposition, pp. 11-12).**

Also we recommend to the Court, as a further reason why Certiorari should be granted, the various arguments made in support of the **Petition For Rehearing**. These arguments are set forth in their entirety as Appendix "B", in the **Appendix to the Petition For Writ of Certiorari** filed in this case. They are incorporated herein by reference.

Respectfully submitted,



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